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OIL OVERCHARGE

HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES UNITED STATES SENATE

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON THE

ECONOMIC REGULATORY ADMINISTRATION'S PROSECUTION OF INDIVIDUALS IN OIL OVERCHARGE CASES UNDER THE "CENTRAL FIGURE THEORY"

MAY 19, 1988

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OIL OVERCHARGE

THURSDAY, MAY 19, 1988

U.S. SENATE,
COMMITTEE ON ENERGY AND NATURAL RESOURCES,
Washington, DC.

The committee met, pursuant to notice, at 9:30 a.m., in room SD-366, Dirksen Senate Office Building, Hon. J. Bennett Johnston, chairman, presiding.

OPENING STATEMENT OF HON. J. BENNETT JOHNSTON, U.S. SENATOR FROM LOUISIANA

The CHAIRMAN. Good morning. The hearing will come to order.

The 1980 presidential campaign was a very interesting one. Ronald Reagan won in a huge national landslide. One of the principal themes of that campaign had to do with the Department of Energy. President Reagan proposed to abolish the Department of Energy, and his proposal, at least in oil country which he carried very strongly, was very, very well received.

Now, in proposing to abolish the Department of Energy, he wasn't proposing to abolish the strategic petroleum reserve, or he wasn't proposing to abolish the national labs or the research into fossil fuels and a whole range of other things. Rather, what he really meant was the Economic Regulatory Administration which had the reputation in oil country as being arbitrary and unpredictable and unjust. Shortly after he was—well, actually after he was elected and before he was sworn in, I had a conversation with him head on head at the Blair House where he discussed this, among other things. And I told him that I thought that the Department of Energy should survive, that these functions were important and could best be operated in one department with the coordination that one department would give. Of course, as you know, it did succeed. It did survive.

About five years ago, we had a hearing right here. I forget who was under secretary at that time. And the ERA was continuing on. Let's see. Five years ago, the rules were about seven years old, and they had been in, effect for a couple of years, give or take a few years. I forget the exact number of years. But we had a hearing here, and I asked I guess it was the Administrator of ERA when they were going to finish the prosecutions under those rules because I thought there ought to be a statute of limitations. And the answer was, Senator, we don't need a statute of limitations because we are very close to getting all of those cases wound up, that by the end of the year—and I forget time of year it was, probably about this time—we will have our business wound up and be out of

business. Now, that was years ago I believe it was. Not only is not the business wound up, but all the cases haven't been filed yet.

And one of the kinds of cases that is continuing to be filed is to me one of the most disturbing I have ever heard. For whatever reason, people in the oil business don't get a lot of sympathy around this town. But I wish people would focus on what has happened in this cental figure theory because to me it is the most outrageous, unjust thing I've ever heard, at least insofar as I understand it.

In the central figure theory they have provided that an individual can be individually liable for acts of a corporation for which he never received any money, or at least where the money he received was relatively insignificant, for acts which he performed in good faith, no showing of negligence, no showing of bad faith, no piercing of the corporate veil, all with respect to rules that were very vague, and where the penalties are sufficient to put him out of business, subject him and his family to financial ruin and all of the accompanying mental suffering that accompanies that, and do it all without the right to trial by jury.

If this were before the events of the Magna Charta at Runnymede, I'm sure that they would have included this. If it were in another field of endeavor other than oil, I think people would rise up. If we were doing this to a whole range of corporate activities, America would rise up. But it's oil people, and I guess they deserve it.

Interestingly enough, this result does not obtain with respect to big oil companies. If this happens with them, then the company will or would come in and bail out the central figure, but with these smaller oil companies, they cannot do it. In some cases the smaller oil companies and the small business have long ago gone out of business, their records gone, and they're there simply to defend individually against their acts committed in good faith.

So, we are here this morning to look into that. I wish the witnesses would, first of all, tell me if I've stated it correctly. And maybe I haven't, and I'm willing to learn about that. But what we would like to look into are policy concerns abou the following.

Should personal liability be imposed on corporate shareholders, officers or employees for non-willful corporate regulatory violations? If such liability should be imposed, should it be in an equity proceeding or in a proceeding at law with proper constitutional safeguards?

Second, should the remedy of restitution which is authorized by the Supreme Court in *Warner Holding* and by statute be distorted to require repayment of overcharge funds never received by the individual?

Third, should the government be able to impose personal liability beyond the amount of any overcharge funds actually received without observing the procedural safeguards that are provided for in the civil penalty provisions of the EPAA or of other statutes which require an agency to afford individuals a trial de novo in Federal district court before penalties can be imposed?

And finally, has the central figure doctrine, as it has been applied by TECA, shifted so much power to the government that the rights of individuals are being fundamentally impaired?

[The prepared statements of Senators Johnston, McClure, and Nickles follow:]

OPENING STATEMENT BY

SENATOR J. BENNETT JOHNSTON, CHAIRMAN

SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES

May 19, 1988

The purpose of this morning's hearing is to focus on a recent development in DOE's enforcement efforts against individuals in oil price overcharge cases: the use of the central figure doctrine of liability in restitution cases restitution cases.

It appears that DOE's successful advocacy of this doctrine before the courts has produced a result that is quite a radical departure from the enforcement regime envisioned by Congress when it enacted the remedy sections of The Emergency Petroleum Allocation Act of 1973. The central figure doctrine imposes liability on any corporate officer or employee in violation of a statute or regulation. The government need not show that the individual engaged in willful misconduct or that he received any monetary benefit from his actions. Indeed, the fact that an individual made a good faith effort to comply with the regulations is irrelevant under this theory of liability.

We are here this morning to attempt to discover whether there is any rational policy basis upon which DOE's promotion of this theory of liability can be justified, and we are pleased to have officials of the Department of Energy here to testify in that regard. We will also hear from a distinguished professor of law, Professor Junger, as to his views of the legal aspects of DOE's theory of personal liability. And,

finally, we will hear from two individuals who are currently being subjected to DOE's central figure theory of personal liability for amounts they never received, and could never hope to repay.

I want to emphasize before we begin that we are primarily interested in learning about the policy implications of the use of this central figure doctrine of personal liability. Among our policy concerns are the following:

* Should personal liability be imposed on corporate shareholders officers or employees for non-willful corporate regulatory violations? If such liability should be imposed, should it be in an equity proceeding, or in a proceeding at law with proper Constitutional safeguards?

* Should the remedy of restitution which is authorized both by the Supreme Court in Warner Holding and by statute be distorted to require "repayment" of overcharge funds never received by an individual?

* Should the government be able to impose personal liability beyond the amount of any overcharge funds actually received without observing the procedural safeguards that are provided for in the civil penalty provisions of the EPAA and of other statutes, which require an agency to afford individuals a trial de novo in federal district court before penalties can be imposed?

* Has the central figure doctrine as it has been applied by TECA shifted so much power to the government that the rights of individuals are being fundamentally impaired?

OPENING STATEMENT R
SENATOR JAMES A. McCLURE (R-ID)
COMMITTEE ON ENERGY AND NATURAL RESOURCES
THURSDAY, MAY 19, 1988

DOE'S PROSECUTION OF PETROLEUM OVERCHARGE CASES

Good morning. Thank you, Mr. Chairman, for the opportunity to make a brief statement.

For too many years this Committee has been frustrated with the aftermath of Federal controls of petroleum prices and allocation. It was my judgment then, as it is now, that the Emergency Petroleum Allocation Act should not have been enacted. And the intervening years have demonstrated the wisdom of my earlier concern. The decision in Citronelle-Mobile involves violations of EPAA regulations that occurred fifteen years ago. And we still are dealing with the fallout of EPAA.

I, like the Chairman, am concerned should the decision of the court in Citronelle-Mobile have an adverse effect on the "Law of Restitution". But I do not think that that is what is at issue here. The decision in Citronelle-Mobile deals with issues of restitution and damages arising from prosecution under the provisions of a statute dealing with violations of petroleum price control regulations.

The issues here are whether people are being treated fairly, whether the prosecution strategy being pursued by DOE is fair, whether the provisions of EPAA are being properly applied by DOE and the courts, and whether the defendants are being afforded an opportunity to present those defenses to which they are entitled under law.

The enforcement provisions of the EPAA are structured to address issues of both equity and damages. But the statute correctly provided different, but separate, remedies for each circumstance. What appears to have happened here, and Citronelle-Mobile is a good example of my concern, is that, in our zeal to prosecute EPAA violations, DOE and the courts have proceeded in such a manner as to blur this distinction in the enforcement provisions of the EPAA.

What appears to have happened is that remedies that the statute intended be used in the enforcement of issues involving settlement of damages and penalties are instead being used in the enforcement of issues of equity or restitution. The question of whether, or not, this has happened is not as important as the question of whether, as a consequence, the burden of proof regarding issues of equity or restitution has shifted from the Federal government to the defendants. If that has occurred, then it should not be allowed to continue.

Under the "central figure theory" it is possible, in appropriate circumstances, to seek to impose personal liability on officers and employees of corporations. When presented with appropriate evidence of misconduct, TECA and other Federal courts have found individuals liable under the central figure theory.

In the situation before us, we are talking about a case where ERA determined that the legal, factual and equitable basis was present to support the "tortious conduct" theory of liability in its enforcement of violations of EPAA regulations. In the other cases, individuals have been jointly named based on such other legal theories as piercing the corporate veil, partnership or trust fund doctrine. But in this case we are talking about the central figure theory of tortious conduct being successfully used to obtain restitution, rather than damages -- even though there may be no difference in the amount of monies involved. While I do not fully understand the implications of this decision for "restitution Law", I do understand that the potential exists for this decision to be used to effectively reverse the burden of proof in the prosecution of other petroleum overcharge cases involving matters of restitution, as distinguished from damages.

In making this statement I recognize that the Congress itself has contributed to the issue before us. The Congress has been one of the Administration's strongest critics, urging that DOE get on with the

prosecution of these cases. As recently as 1986 the Congress enacted the Petroleum Overcharge Distribution and Restitution Act as a part of the Omnibus Budget Reconciliation Act. With that act we ratified the so-called "stripper well" litigation settlement and provided for the distribution and restitution of those petroleum overcharge funds arising from violations of EPAA crude oil pricing regulations.

There was universal support for that legislation by the Congress, the Administration, the States, and the many other affected parties. But that support was premised on a predictable termination of all pending cases. The Congress was concerned that long after termination of controls, there were many cases still in the prelitigation stage.

Accordingly, the Conferees adopted a modified version of the Senate passed statute of limitations, and urged the Administration to proceed with the prosecution of all pending cases as quickly as possible. The conference report was careful to stress that --

> "our express intent (is) that all alleged violations of the applicable law and regulations be pursued full, fairly, and expeditiously. We do not want, or intend, by adopting this provision to allow those who have violated the laws and regulation to escape prosecution." (H.Rept. 99-1012).

But equally important, support for the legislation was premised on the 1986 "Stripper Well" settlement agreement remaining unchanged. I therefore would be concerned should it be suggested that the Committee do anything to disturb that agreement or how it is understood by its signatories.

What is clear is that we are talking about the application of current law by DOE and the courts. In other words, we must not allow ourselves to be influenced by debates on the merits of individual cases. The Congress must not appear to debate the merits of individual cases or to disturb the status quo regarding the prosecution of the currently pending petroleum overcharge cases, so as to produce a different result than intended in the Petroleum Overcharge

Distribution and Restitution Act of 1986.

What we are concerned with here is the application of existing law. It is within the discretion of the Administration and the courts to correctly distinguish between the issues of equity involved in restitution and damages in the application of the EPAA enforcement provisions. Whether or not they will exercise this discretion so as to restrict or circumscribe the application of Citronelle-Mobile to prosecution of other petroleum overcharge cases or other cases involving restitution remains to be seen.

As I stated at the beginning of my statement, Mr. Chairman, what we are talking about here is whether people are being treated unfairly by DOE and our judicial system. Is the process working correctly to protect the government interests in restitution and to protect those individuals involved so that they can present defenses to which they are entitled under law?

Thank you for the opportunity to make these remarks and I look forward to the testimony this morning.

Nickles

STATEMENT OF SENATOR DON NICKLES
HEARING ON DOE OIL OVERCHARGE PROSECUTIONS

MAY 19, 1988

Mr. Chairman: Thank you for holding this oversight hearing on the Economic Regulatory Administration's prosecution of individuals for joint and several liability under the "central figure" theory of recovery in restitution.

Although I firmly oppose petroleum price and allocation controls, such as were imposed on the domestic oil industry during the 1970's, I do not oppose the appropriate prosecution of those who knowingly violated those regulations.

However, I am concerned that the Department of Energy is becoming overly zealous in its prosecution of individuals associated with the firms alleged to have overcharged their customers. The zeal for "oil overcharge" moneys must not be an excuse for prosecutorial tactics that violate individual rights. Just because the defendant is in the oil business should not be grounds for applying to him a lower standard than would be considered appropriate for individuals that allegedly violate other complex federal regulatory schemes.

As anyone who was in business in or around the oil industry during the period of the Petroleum Price and Allocation Regulations will tell you, the details of those regulations were a moving target. Throughout the long life of the price and allocation controls, the Federal Energy Office, the Federal Energy Administration and later, the Department of Energy, made frequent refinements to those regulations. In many cases, these changes were labeled "clarifications" which were applied retroactively to transactions all the way back to May 15, 1973, which served as the basis for calculating allowable prices through 1981.

With this background of complex, unworkable and shifting regulations, it is particularly important that the Federal government and the American people not succumb to a "guilty until proven innocent" mentality. There were those

individuals who knowingly charged excessive prices to their customers. There were others who believed that they were in their legal rights under the pricing regulations to charge prices that later can be shown to have been excessive. I believe we should not lose the distinction between these two groups of individuals.

This hearing focuses on a narrow issue. Should an individual be liable for oil overcharge refunds in an amount in excess of his own enrichment without there first being an adequate showing that the individual acted knowingly, willfully, or even negligently? I look forward to hearing from the witnesses.

The CHAIRMAN. Gentlemen, with that beginning, let me recognize first the Honorable Joseph F. Salgado, Under Secretary of the Department of Energy. And he is accompanied by Eric Fygi, Acting General Counsel, and Chandler van Orman, Acting Administrator of ERA. Gentlemen, welcome. Some of this has taken place before you were here and maybe without your complicity. So, I don't necessarily consider you to be a central figure in having imposed this liability. [Laughter.]

First of all, I would like for you to state, if you would, Mr. Salgado, if I have stated it correctly about individual liability which he never received or received only a small amount, good faith, no negligence, no bad faith, no piercing of the corporate veil, et cetera. Is all of that correct? And if not, would you give your account of it?

STATEMENT OF JOSEPH F. SALGADO, UNDER SECRETARY, DEPARTMENT OF ENERGY; ACCOMPANIED BY ERIC J. FYGI, ACTING GENERAL COUNSEL; AND CHANDLER VAN ORMAN, ACTING ADMINISTRATOR, ECONOMIC REGULATORY ADMINISTRATION

Mr. SALGADO. First of all, Mr. Chairman, thank you for the opportunity to come up and get embroiled in probably a very interesting legal discussion with a lot of attorneys involved here.

I think that in essence you have structured some of the parameters of the "central figure" theory of liability. I am not quite sure that your analysis has been applied to particular cases, either within ERA or before TECA at this time.

The CHAIRMAN. Well, I guess the *Citronelle* case in which the theory was invented——

Mr. SALGADO. I think that as reasonable persons, we may have a disagreement then on the "central figure" liability theory and on its application to the facts in the *Citronelle* case. And I would like to be able to ask Mr. Fygi and Mr. van Orman to address that.

But first I would like to indicate for the record that, at the Secretary's direction, Mr. Fygi has prepared the independent review of the "central figure" theory that you requested, and a copy of the report to the Secretary I believe has been provided to the committee early this morning. We apologize for its lateness.

Second, I would ask that Mr. van Orman's statement be included in the record and that he be given an opportunity, at some appropriate time, Mr. Chairman, to make some brief comments and an overview of the "central figure" theory of liability and how it is utilized within the ERA context.

[The prepared statement of Mr. van Orman follows:]

OPENING REMARKS OF CHANDLER L. van ORMAN
ACTING ADMINISTRATOR OF THE
ECONOMIC REGULATORY ADMINISTRATION
U.S. DEPARTMENT OF ENERGY

BEFORE THE SENATE COMMITTEE ON ENERGY AND NATURAL RESOURCES
MAY 19, 1988

Mr. Chairman, I appreciate the opportunity to appear before the Senate Committee on Energy and Natural Resources today on the issue of joint corporate and personal liability for allegations of oil overcharges under the petroleum price and allocation regulations. I know this is a matter of great interest to you, and I hope my remarks will assist the Committee in addressing this question.

The primary purpose of the Economic Regulatory Administration has been to enforce the price control regulations implemented in 1973 through various statutes that were in effect until the President's decontrol Order was issued in January 1981. One of the more difficult tasks facing this agency has been recovering the overcharge amounts from those who were not in compliance with the regulations, and effecting adequate restitution to those who were harmed as a result of these overcharges. This task has been made especially difficult due to the general downturn of the oil industry, and the fact that while many firms are in business and remain solvent, there is a significant number which are either in bankruptcy, are completely out of business, or are barely surviving while heavily indebted.

We are particularly sensitive, therefore, to our dual and sometimes conflicting responsibilities of enforcing the regulations and recovering the maximum dollar amount in every case, while recognizing the plight of the oil industry and not forcing firms into bankruptcy. In this regard, we have placed great emphasis on negotiation as a means of resolving these complex cases, and we have relied upon financial analyses of firms as a means of settlement where the value of a case, on its merits, exceeds the worth of the firm.

Faced with the realities of litigating for years only to find little in the way of available assets, ERA has considered this in settlement. For example, in the context of the Federal Energy Regulatory Commission's formal settlement process, ERA is currently discussing settlement with approximately 15 crude reseller firms and the related individuals who have been joined in those cases and charged with "layering" violations. "Layering" involved mere paper trading, at a markup, from one reseller to another, but without either transporting the oil or performing any other traditional crude oil reselling function. These discussions are focused solely on the financial conditions of the companies and individuals and not upon the amount of overcharges alleged. In that process we are using settlement guidelines for financially troubled firms which are based upon a percentage of net worth, even if that yields only a fraction of the violation amount sought. Such an approach is based on

considerations of the government's likely collection problems even if successful in litigation, and it also avoids financial ruin for the individuals and firms.

During the seven year period of price controls, ERA and its predecessors conducted over 20,000 audits in various sectors of the petroleum industry. Those audits have already resulted in over $6 billion in refunds through more than 4,000 negotiated consent orders and hundreds of litigated court orders and remedial orders.

We have sought to hold individuals jointly liable with the corporations for all or part of the alleged violations in less than 10% of the cases which have been brought to litigation during the history of the program. In only 38 of the 150 or so current cases involving overcharge allegations does the agency seek to join individuals. In 37 of those cases, the agency has impleaded 40 individuals based on a legal theory of tortious conduct. The other individuals are jointly named based on such legal theories as piercing the corporate veil, partnership or trust fund doctrine.

Nearly all of the current cases in which individual liability is alleged involve crude oil reseller transactions which are suspected of violating the regulatory "layering" prohibition, the maximum lawful selling price rules, the

anti-circumvention provisions, and/or the rule requiring a reseller to correctly certify the "tier" of oil traded. These types of violations and the crude reseller segment of the industry are relevant to the agency's original determination to seek individual liability in the current group of cases.

At the inception of price controls, in 1973, there were fewer than 50 companies in the business of reselling crude oil for profit. By the time the President ordered decontrol in January 1981, there were more than 400 such companies. The vast majority of the new firms were incorporated in the late 1970's and were close corporations with few employees other than the one or two shareholders. Overhead and capital needs were low, but in many instances the profits were enormous. Most of the profits, though, appear to have been illegal under the regulations.

Starting at decontrol, more and more of these new companies left the oil reselling business or quit active business altogether. This exodus was accompanied by a harsh reality: many of the firms, after several years of multi-million dollar profits, have little, if anything, left for creditors such as DOE. However, based upon financial information available on some of those corporations, the agency had seen huge dividends declared for shareholders, and very high salaries and bonuses paid to corporate officers responsible for the profits. As a

consequence, and consistent with its responsibility for obtaining refunds, the agency began approaching the question of liability by also considering the individual conduct which caused the harm.

Because of the virtual impossibility of DOE achieving restitution from any of these corporations with respect to the overcharges they received, ERA considered other options. Historically, ERA had generally not sought to hold individuals liable because, first, during controls, price rollbacks by the violating firms could be effective in returning the overcharges to the relevant categories of consumers. Second, the firms with whom ERA was then litigating were generally stable and able to make restitution for violations committed, so there was not the same impetus to consider other potential respondents. Accordingly, when it became clear that effective remedial measures might not be achieved in all cases by proceeding only against corporate respondents, ERA reviewed the possibilities of joining as respondents in the overcharge cases those individuals who might be held legally responsible for the violations.

The theory of "tortious conduct" by a corporate official giving rise to individual liability is not novel in the jurisprudence, nor is the application of that legal principle unique to the Temporary Emergency Court of Appeals (TECA). The tortious conduct doctrine has been applied in a number of

contexts, most frequently involving conduct which would be actionable torts at common law, but in others involving conduct which was violative of federal or state statutory prohibitions. In the past 50 years, the federal appeals courts have adjudicated joint individual and corporate liability for violations of patent and copyright laws, civil rights statutes and trade and securities regulations, as well as for breach of contract. Although only TECA has applied the principle in the context of petroleum pricing violations, that is not surprising in light of TECA's exclusive appellate jurisdiction in these cases as conferred by statute.

The principle was first applied by the TECA in 1981, in the context of an operator liability at issue in the Sauder v. DOE case. In Sauder, the appellant argued that in a public enforcement action for restitution under Section 209 of the Economic Stabilization Act of 1970, the liability of the operator of a crude oil producing property who caused the overcharges from that property should be limited to the benefits received by that person, because additional liability would be in the nature of damages in tort, rather than restitution. The court rejected that argument, holding that full liability was warranted under Section 209 in order to restore the status quo, to "set things right." In 1985, TECA followed that decision in the $2.1 billion U.S. v. Exxon case, imposing liability on Exxon as operator of the Hawkins Field for 100% of the overcharges,

plus interest, because of its conduct in causing the violations -- even though Exxon did not own all of the production interest and did not receive all of the overcharges. In the U.S. v. Sutton decision, and again in the Citronelle decision of last year, TECA stated that the same principle which justified operator liability for the entire overcharge amount in Exxon and Sauder also supported individual liability for the entire overcharge amounts in these crude reseller cases.

As applied by TECA and other courts, a tortious conduct case is in no way proven by mere reference to the person's ownership of corporate stock or his position in the corporation; rather, the evidence must show that the individual's conduct caused the wrong. The doctrine and its application are entirely consistent with the principle of shareholder immunity, but it appropriately rejects the notion that shareholder status provides complete liability protection for the individual's conduct, regardless of its nature. The facts of each case must be carefully considered, and that is what the agency has sought to do in its role as prosecutor.

In summary, Congress has charged the ERA with the responsibility for obtaining, through the legal process, refunds of overcharges. The agency has been judicious in its attempts

to hold individuals liable, but ignoring individual liability in cases where the principle appears applicable would not be responsible prosecution.

I will be pleased to address any questions the Committee may have.

Mr. SALGADO. But first to address your question, I ask Mr. Fygi to give his independent analysis of the *Citronelle* case and your legal assumptions or presentation.

Mr. FYGI. To summarize, Mr. Chairman, directing my response to the particular issue you raised, first it does not seem from reviewing the court opinions that that case prompted, that all of the factual characterizations that you included were shared by the courts. I think the courts viewed the matter as a course of conduct that was not benign, nor was it sheer happenstance or accident. And had the case been as you described it, it may well have provoked a different outcome, but we will never be able to ascertain that.

There was a finding of "good faith" prompted by the original district court hearing on whether civil penalties should be imposed for willful misconduct, and Judge Alaimo included that characterization in addressing some of the issues in the case that were, in effect, reheard in the second district court proceeding.

The CHAIRMAN. If I may read. "The defendant sought the advice of counsel before proceeding with their transactions. The defendants made a good faith effort to comply with the regulations, and clearly and fully explained their transactions to the Department of Commerce. It is clear that any violation proceeded from the inexperience of the agencies in administering the new regulations and the unusual time constraints under which they were placed."

Mr. FYGI. Those were not TECA's words, Mr. Chairman. TECA, when it was confronted with those words by counsel for the companies and Mr. Chamberlain, as I recall the way TECA handled it, observed you have to consider those words in the proper context, and the context was action on the civil penalties claim when the original finding was made by Judge Pittman. And TECA's view of the sum and substance of the facts prompted it to observe that there is something different between absence of willful misconduct and good faith, and the seeking of a legal opinion standing alone does not establish insulation from the legal consequences of a deliberately chosen course of action.

Now, I'm not testifying as to my own opinion of whether that characterization is or is not apt. I'm merely telling you that that is my view of how the appellate courts described and characterized the actions.

The CHAIRMAN. Well, I understand you are, and I know you are not, at least in this instance, defending the findings of fact by the court. But in this kind of particular proceeding—and it is very important that we understand what the court did hold.

It was my understanding that the district court, the finder of fact, did hold that as a matter of fact, that TECA did not reverse those findings of fact, but rather found in those facts different legal conclusions which were, in effect, that they were, I think as you said, deliberately taken actions even though taken in good faith without negligence, that they were deliberately taken and they lead to a separate legal consequence; i.e., when you violate the rule, you get personal liability.

Now, can you point to a different construction of those facts by TECA?

Mr. FYGI. Well, I think I agree in large measure with your observations with one further observation that the facts as such were es-

tablished in the district court proceedings below. And those facts, going back to the history of the case, were established as a result of the usual discovery, depositions, that sort of factual inquiry, as well as audits. What is at issue here is not so much what the factual findings were, but what inferences and what legal characterizations the courts have drawn from or placed on those facts.

The CHAIRMAN. I mean, for example, here is a statement of Donald W. Guillory, who is one of our witnesses later on, and he states here that "the complaint against me does not contain any allegations of any willful misconduct on my part or even that I was negligent. It does not claim that I received the benefits of any of the transactions DOE claims were illegal." It seems, if he is correct, to reinforce what I'm saying about what the court held that the court does not require bad faith or even negligence, and that that is DOE's view at least in the complaint filed against Donald Guillory. Am I correct on that?

Mr. FYGI. Well, if I may respond to that. My review was confined to the case law generated by TECA already, as well as whatever earlier precedents may shed light on that case law.

And among other things, I would add in response to an earlier question, it does not appear that TECA invented the "central figure" theory of liability. But putting that aside, it does not sound to me like the kinds of factual relations—or in the document you read, it does not sound like the kinds of cases that TECA has dealt with before. So, I would be unable just on the basis of what you read me, assuming that it was entirely accurate, unable just from that to see or to understand what the legal consequences would be.

Mr. SALGADO. Mr. Chairman, on that point, could I ask Mr. van Orman to address the Guillory issue?

The CHAIRMAN. Yes.

Mr. VAN ORMAN. Mr. Chairman, the case involving Mr. Guillory is pending. It is in open litigation. And we do not yet have the benefit of even his answer in that case.

The CHAIRMAN. Well, I know, but we know what the allegations are. Are you seeking personal liability and have you alleged willful misconduct or negligence or any other wrongdoing on his part?

Mr. VAN ORMAN. We are seeking personal liability. We did not allege willful misconduct nor negligence because it is not required.

The CHAIRMAN. Okay. I think that is fairly stated. Willful misconduct is not required or negligence is not required. What is required under the decision?

Mr. VAN ORMAN. Each case, of course, turns on its own facts, but as TECA seemed to hold in *Citronelle*, there is a combination of factors which it, TECA, would consider in making a determination as to whether an individual was personally liable. Those factors would include, but would not necessarily be limited to, the conceptualization of the act that resulted in the wrong, participation——

The CHAIRMAN. The conceptualization means?

Mr. VAN ORMAN. Dreaming up a scheme to beat the regulations, for example, participating in that, taking a personal hand, personally benefiting, approving the plan.

The CHAIRMAN. Well, now, the personal benefit. He says that "it does not claim that I received the benefits of any of the transac-

tions DOE claims were illegal." You didn't allege that, did you? And that is not required that he benefit personally.

Mr. VAN ORMAN. That is not required. It is one of the elements which TECA in the line of cases preceding *Citronelle* indicates is a factor.

The CHAIRMAN. It could be relevant, but it is not required.

Mr. VAN ORMAN. That is right.

The CHAIRMAN. Well, I think is a very fine point here because, Mr. Fygi, your statement to us of May 18 there toward the end says in talking about *Citronelle-Mobile*, "whether any given case is suitable for individual liability done through a corporation"—you consider the A, B, C's here—"A, does it appear that the potential individual defendant consciously choose a course of action designed to skirt the law."

Mr. FYGI. Yes. That is one of the relevant factors that I infer is important from reading the *Citronelle* case.

The CHAIRMAN. You used the phrases "skirt the law" and "consciously choose." Of course, "consciously choose" I would submit is an absolutely meaningless phrase because anything you do with respect to rules and law is conscious. What is it? Unconscious? You're on drugs, you're dreaming. I mean, it has to be conscious.

But this phrase "skirt the law"—and I think the one you used was——

Mr. VAN ORMAN. Beat the regulations.

The CHAIRMAN. No. What was the phrase you just used? "Conceptualization," yes. I mean, what is that?

I understand "skirt the law." That means that you conspired or you dreamed up the scheme intentionally to violate the law. That is fraud.

Mr. FYGI. No, I would disagree with that, Mr. Chairman. That is not what we were saying. By "skirt" I mean intending to design a course of action that——

The CHAIRMAN. Say it again please.

Mr. FYGI [continuing]. That is intended to get as close as possible to achievement of the objectives in a way that may well violate the law, but may well not quite violate the law. It's pretty close, not entirely certain. But that's what the intended context happens to be. And furthermore, to——

The CHAIRMAN. Could you also state to take full advantage of the law means skirt?

Mr. FYGI. Well, take full advantage. It depends how one means, "taking advantage," I suppose. In a Victorian sense, I suppose I agree with you. [Laughter.]

The CHAIRMAN. Here you have some little businessman down there, and he wants to make as much profit as he can. So, he gets his lawyer and he calls up ERA or whatever, and he says what can I do on this thing. And they say, well, you can do A, B, C. So, he does, A, B, C consciously. Yes, he's conscious. You bet he's conscious. It's the free market. And by the way, I believe in the free market. The free market says a guy wants to take full advantage of everything he can do under the law, that he doesn't want to pay any more taxes than he has to pay. He doesn't want to pay any more regulatory rent under these crazy rules that Congress dreams up. And so, that's what he does.

We use the words "skirting," "conceptualize." What is it we are punishing here? Did he consciously violate the law? That is not required, is it?

Mr. VAN ORMAN. No, it is not. It is whether he violated the law.

The CHAIRMAN. Excuse me?

Mr. VAN ORMAN. The question is whether he violated the law.

The CHAIRMAN. Okay, well, we're together then. What you are saying is it doesn't matter his state of mind, state of negligence or any of those things. If he violates the law, he is personally liable, if he is conscious. If that's not right——

Mr. SALGADO. No, I don't think that's right.

The CHAIRMAN. I'm not quibbling. This is the central point.

Mr. SALGADO. Right.

Mr. Chairman, I haven't done the in-depth analysis back to Learned Hand as Mr. Fygi and Mr. van Orman have, but I think what we are dealing with here is some knowing conduct upon which not only the spirit of the law is broken, but upon which the courts themselves look upon this set of factual transactions and deem there have to be some equitable redistribution of unlawfully gained profits. And I think that that is probably in the generic sense what we are looking at because obviously as we go——

The CHAIRMAN. Equitable redistribution of ill-gotten gains. But he didn't get them.

Mr. FYGI. Well, that gives rise or is the preface to the much narrower question raised by——

The CHAIRMAN. The traditional law has been——

Mr. FYGI. I'm sorry?

The CHAIRMAN. I say the traditional law was, before the *Citronelle* case, that if you were going to use the theory of restitution, that you didn't go beyond that which was gotten.

Mr. FYGI. Well, as our review indicates—and I must confess a little bit to my surprise—there is a very substantial body of case law that does not observe that. And when I say very substantial, I should indicate there are not very many cases, but there are rare circumstances where the factual dichotomy between wrongdoer and recipient even exists.

But the *Sheldon* case that we describe in our letter I think is particularly instructive, where wholly-owned subsidiaries of the defendant parents had retained profits and not repatriated the profits, yet the parent corporations were held fully liable for those unrepatriated profits. And that case, like these petroleum cases, was an equity proceeding to return profits stemming from copyright infringement under section 25 of the Copyright Act, and like the *Citronelle* case, it was characterized as a tort flowing from a violation of a Federal statute. That was a 1939 opinion by Learned Hand. And yet, the courts did not hesitate in those circumstances not to observe the corporate distinctions.

And similarly, more recently, in 1971 in the *Texas Gulf Sulfur* case, an insider trading case, an equity case, the Court of Appeals for the Second Circuit upheld restitutionary imposition on an insider trading tipper who conveyed inside information, but where the money had been received only by his tippees. And the court said, we understand that is a hardship, but it is necessary and appropriate in this case.

The CHAIRMAN. Yes, but that is so different. That is willful misconduct, even more than negligence.

Mr. FYGI. The point of the matter is that the analysis of the court did not turn on that factor, but rather that there was a violation of the SEC rule in question and thereby a violation of the 1934 act. And the question was what——

The CHAIRMAN. An intentional violation.

Mr. FYGI [continuing]. Remedy was appropriate.

The CHAIRMAN. Yes, but it is an intentional violation. This is totally different.

Mr. FYGI. *Texas Gulf Sulfur* was an equity proceeding for restitution and an enforcement proceeding. It was not a case in which there was a criminal prosecution for willful violation of the securities laws, so that the standards were exactly like those in the *Citronelle* case. I think there is more similarity than dissimilarity.

The CHAIRMAN. I take it all of you think the *Citronelle* case was correctly decided?

Mr. FYGI. As the conclusion of our letter of the 18th indicates, we think the *Citronelle* case was neither a testament to any creativity or originality by TECA, nor does it seem to have gone beyond the bounds of what occurs when equity powers are provided the courts in regulatory legislation.

The CHAIRMAN. And you agree that it was correctly decided.

Mr. FYGI. We agree that it was correctly decided.

The CHAIRMAN. Do you agree with that, Mr. Salgado?

Mr. FYGI. I agree that there is justification for the decision based upon the facts and the applicable law.

The CHAIRMAN. And do you agree with that, Mr. van Orman?

Mr. VAN ORMAN. Mr. Chairman, Mr. Fygi phrased it much more eloquently than I could, but I do agree.

The CHAIRMAN. Do you think that it is proper policy for an individual to be held personally liable to the full extent of the amount that the corporation violated, even though the individual didn't receive it, for acts which he committed consciously, but without negligence and without bad faith?

Mr. FYGI. I think my response, which goes perhaps a little beyond the four corners of the study, is not necessarily, and that individual liability should not occur mechanically or thoughtlessly, nor should it be a routine, commonplace event in American law that corporate forms are not distinguished. I would emphasize that the teaching of *Citronelle*, as I read it, is that here is one of those rare cases where we had elements of all——

The CHAIRMAN. I didn't ask you about that. I asked you a question.

Mr. FYGI. Right.

The CHAIRMAN. Do you remember the question?

Mr. FYGI. The question was whether as a matter of policy in our view—of legal policy, let's say—that corporate liability ought to be imposed on individuals in circumstances where there was not a showing of negligence and where——

The CHAIRMAN. Or bad faith.

Mr. FYGI. Or bad faith. And the thrust of your question invited, I believe, a response dealing with how commonplace such liability ought to be.

The CHAIRMAN. Should it or should it not, and then explain why it should or should not.

Mr. FYGI. So, I would say that the answer—I would say no would be in the first instance.

The CHAIRMAN. No, they should not?

Mr. FYGI. Right.

The CHAIRMAN. Well, if Mr. Guillory is correct about what he has alleged, I mean, if the complaint against him does not show that he acted in bad faith or with negligence or that he received the profits that resulted from it—and, indeed, he says, "The size of DOE's claim against me far exceeds the amount of civil penalties that could be imposed upon me if I had engaged in willful misconduct." If all of that is correct, then that case would have been improvidently brought against him, would it not?

Mr. VAN ORMAN. Well, Mr. Chairman, the conclusion reached in any case turns upon the facts in that case. And the facts in this case, even though the PRO has been filed, have not yet been fully developed. As I indicated before, it is in active litigation. We do not have the answer yet from the defendants, and it may well be that in the adjudicatory process that other facts come to light which lead us to change our original conclusion. But at this point——

The CHAIRMAN. Frankly, I don't know Mr. Guillory. I was just given this statement here. So, I want to be clear. He may be from Louisiana. Yes, he is. [Laughter.]

But I still don't know him. I figured with a name like that he must be from Louisiana.

Mr. SALGADO. Mr. Chairman, if I could only add for clarification. In my own mind, Mr. Fygi's statement agrees with the mechanics that you laid out—this is not a mechanical process. And we are not as a Department in a policy mode to create inequitable situations where individuals are held liable for past wrongs or past perceived wrongs in a mechanical sense. And we are back to the equitable considerations. It has to be reviewed on a case-by-case basis.

And I would hope, if anything, when we leave this hearing, that there is at least a common understanding that we are not taking an overall view of using the "central figure" liability theory in a capricious and unthoughtful manner. And I would hope that both in the program and the legal counsel that that theory of liability is only utilized in those cases upon which there is strong evidence that equitable considerations would mandate its use. And given our role is both trying to arbitrate and negotiate these cases as well as being——

The CHAIRMAN. How many times has it been used since *Citronelle*?

Mr. SALGADO. Since *Citronelle* or prior to *Citronelle*?

Mr. VAN ORMAN. Mr. Chairman, of the over 20,000 audits that we conducted and of the 4,000 and some cases settled by consent order, we have used the "central figure" theory in less than 1 percent of the cases.

The CHAIRMAN. Do you know how many times it has been alleged since *Citronelle*?

Mr. VAN ORMAN. A total of 70 cases have been brought using that theory, 38 of which continue to exist in some form, either before the Office of Hearings and Appeals or various courts.

The CHAIRMAN. How many cases are now pending?

Mr. VAN ORMAN. At the present time using the central figure theory?

The CHAIRMAN. Well, I want to know how many are pending total, and how many using the central figure.

Mr. VAN ORMAN. I think we have approximately 150 some judicial cases and 114 administrative cases, many of which are the same cases.

The CHAIRMAN. Okay. And 70 of those are central figure?

Mr. VAN ORMAN. No, in 38 of those are we seeking individual liability based on——

The CHAIRMAN. That's 38 out of how many?

Mr. VAN ORMAN. Well, less than 300 in toto.

The CHAIRMAN. It sounds like a pretty big percentage to me.

Now, how many of those did you go back and reallege after the *Citronelle* case?

Mr. VAN ORMAN. In not one.

The CHAIRMAN. All of those had been pending prior to that case.

Mr. VAN ORMAN. Yes.

The CHAIRMAN. I mean as central figure cases.

Mr. VAN ORMAN. The Carbonit PRO, which was recently filed and filed subsequent to the decision in *Citronelle*, also requests individual liability on behalf of one person. That was filed since the *Citronelle* case.

The CHAIRMAN. That was on a pending case?

Mr. VAN ORMAN. I think that is the only one.

The CHAIRMAN. And you did that even though *Citronelle* did not change the law?

Mr. VAN ORMAN. Yes.

The CHAIRMAN. I understand in Bayport Refining you charged a part-time secretary with personal liability for acts committed two years before the hearing. Well, in any event, a part-time secretary is being charged with personal liability.

Now, you say that you are using it very little, 38 out of 100 and something. But you use it only with equitable considerations. If I may again find out what those equitable considerations are. Now, we have gotten the word "conscious." We've gotten the word "conceptualize." We've gotten the word "skirt" the law. Can you give us something more than that as to what equitable considerations are?

Mr. VAN ORMAN. Mr. Chairman, I'll do my very best. Most of the cases in which we seek individual liability are crude reseller cases, and in those cases the corporate respondents and individuals are charged with a number of violations.

At the beginning of price controls, there were probably less than 40 crude resellers in the business. When price controls disappeared in 1981, there were more than 400 such companies. Most companies were undercapitalized. They consisted of a telephone in an office somewhere. They were owned by one or two people, generally related. And they existed, as we have alleged in a number of cases, primarily to take advantage of the regulations in buying and reselling crude oil.

The evidence has shown in most of these cases and our investigations have determined that most of these companies are out of

business. The corporations themselves have no tangible assets. Yet, during the period when they were in existence, they made millions of dollars of profits, most or all of which were illegal. And in our attempt to satisfy the congressional mandate we have to identify the overcharges, to quantify them where we can, and attempt to recover them. It is extremely difficult to look at a situation where there is a company with no discernable assets and look at the individuals who owned, operated, controlled that company who may well have assets, who benefited from the illegalities in which they participated——

The CHAIRMAN. Well, wait a minute.

Mr. VAN ORMAN [continuing] And seek recovery against them.

The CHAIRMAN. All right. You used another word there, "benefited." And I understand that. That is certainly an equitable consideration, but that's not *Citronelle* and that's not *Guillory* and that's not what I'm talking about because that is traditional equity law as you get the guy who has benefited to the amount he benefited, and get the money back. But you're not talking about that here, are you?

Mr. VAN ORMAN. Well, the term "benefit" has never been properly defined in these contexts. Would it be a benefit to an individual who received a salary that was generated from illegal activities? It might well be. Bonuses that were generated by the illegal activities.

The CHAIRMAN. Absolutely.

Mr. VAN ORMAN. That would be a benefit. If he were a stockholder in a company and the value of his stock increased as a direct or indirect result of illegal activities, that would also be a benefit.

The CHAIRMAN. Absolutely, yes. It would be a question of fact as to whether the—and, indeed, I think you could pierce the corporate veil on an undercapitalized company used as a shell to put the money in the salaries. But as I understand it, that is not what *Citronelle* required and that is not what you require. I am concerned about what else we have. The benefit is certainly not a requirement here, is it?

Mr. VAN ORMAN. No, it is not.

The CHAIRMAN. Take advantage of the regulations or skirt the regulations. Again, if that means intend to violate the regulations, that is clear, or even negligently taking conscious action. But what more is there? Can you tell me what more is there? What more ought there to be?

Mr. VAN ORMAN. Well, I'm not sure what there ought to be. In terms of negligence, it is not necessary to show negligence in the violation of a Federal statute, of course.

The CHAIRMAN. Well, section 754 of the Petroleum Allocation Act, U.S. Code title 15, section 754, talks about "an individual director, officer or agent of a corporation who knowingly and willfully authorizes, orders or performs any of the acts," et cetera. That requires more than negligence.

Mr. VAN ORMAN. That does. That's a willful showing and would subject an individual to either criminal or civil penalties.

The CHAIRMAN. Yes.

Mr. VAN ORMAN. In many of these crude reseller cases, individuals have been indicted and convicted for willful violations.

The CHAIRMAN. Yes. And certainly if they do it knowingly and willfully, that's clear. And even if they do it negligently—and we can argue about it, but let me tell you. I would certainly hate to be charged with my whole fortune based upon the fact that I consciously, but in good faith, consciously conceptualized something to skirt the regulations. You say, well, what does skirt the regulation mean. Well, it means you were trying to make money in the business.

Mr. FYGI. Can I respond to that, Mr. Chairman, because I'm certainly sympathetic to that kind of situation. But it's important that we look back at the particular facts that gave rise to the particular case in which such generalities are made.

And getting back to your observation about negligence, I think the entire flavor, coloration, of the facts as they are described in the court opinions in this case indicates that negligence would have been a lesser form of misconduct than that which the courts actually perceived.

And I would add that there are other factors. Even the litigation itself, one must remember, was not brought by the government. It was instituted by the defendants, including Mr. Chamberlain. Mr. Chamberlain has been exceedingly ably represented by many lawyers and very able practitioners, and twice has had the opportunity to have the merits of his case considered by the Court of Appeals and the Supreme Court.

There have been many episodes of that particular piece of litigation where, in hindsight, perhaps the events might have been slightly different, but they are not all of the government's making I think in this particular case. They are not all of the making of some new theory imposed by TECA. Certainly one can sympathize that in hindsight, it may have been a business judgment of a sort that was made by an individual, which judgment might have been understandable. But yet, it was a business judgment that strikes me as different from what I ordinarily think of business judgments. It was one that was made more with respect to how various Federal regulatory systems work than how the market works.

And I can understand and sympathize a great deal with entrepreneurial risk-takers who venture their capital in enterprises where there is genuine economic uncertainty from an entrepreneurial standpoint of the outcome, but here the risks undertaken were all legal. So, that being the case, it is not entirely unforeseeable nor necessarily is it entirely unjust, perhaps, in a legal sense that the individual bet his capital on the legal risks and found that those legal risks had come out in a manner unsatisfactory to him. He gambled, and he lost. So, that's a little different than my sense of the entrepreneurial virtue of one who bets his whole fortune in punching holes in the ground. There are other kinds——

The CHAIRMAN. You say, in effect, that these cases are based upon taking a gamble on the law. And if he loses, he ought personally to lose. Would he have known at the time he took that gamble that he would be personally liable?

Mr. FYGI. Well, had he read Learned Hand's 1939 opinion, perhaps he might have realized that that was a possibility.

The CHAIRMAN. Well, he certainly was presumed to know the law. There is no doubt about that.

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Well, gentlemen, before I turn to the next panel, is there anything I have not let you say that it is not either in your written statement or orally, or could you as a final word give me any further elucidation on what it is that is required? I'm beginning to see if you make a legal judgment not negligently, not in bad faith, but in an area of uncertainty, as in a case where you have a regulatory administration that hasn't yet said what the rules are, and where you can't find out—you call them up and they say, well, everybody is doing this, but that's not final. I can't tell you that is for sure, but that is the way people are doing it. As I understand it, that was the way people in the business did, didn't they?

Mr. FYGI. Well, I'm not sure those were the facts of this case. I do not remember the——

The CHAIRMAN. I don't know that those were the facts of this case.

Mr. FYGI [continuing]. Appeals were predicated on that.

The CHAIRMAN. I know other cases they did that.

Mr. FYGI. There have been other cases, like the *Pennzoil* case, in which TECA found unpersuasive and basically incredible contentions that, gosh, the company was confused and it didn't know where to go for an opinion, because the relevant regulations that were first promulgated by the Cost of Living Council indicated exactly how to get an interpretation. Now, there apparently was a big backlog of such requests during the embargo, but I don't think that particular theory was advanced in the defense of the *Citronelle* case.

Mr. SALGADO. Mr. Chairman, there is just one uncertainty here that I would like Mr. van Orman to clear up for the record and that is the utilization of this theory of liability and what the Department looks at when it does utilize this, so that we are not left with the idea this is a capricious and unthoughtful utilization of a theory of liability. I think it is highly technical and is also one I think that has a potential for a lot of negative impacts on both the industry and individuals if it is not utilized in a judicious manner. And I would like Mr. van Orman at least to hopefully assure this body that it is something that we take great care in.

Mr. VAN ORMAN. Mr. Chairman, there is no doubt that this is a complex and complicated issue. But please take comfort, what little comfort you might, from the fact that we are very judicious in our use of alleging personal liability. We are charged with the identification and collection of overcharges, and beyond that point, restitution to those people who were harmed. You and I both paid more than we probably should have for some of these petroleum products. In cases where we can identify the overcharges, the violators, collection is the first part of the case. The second part is to effect refunds of those overcharges.

And we think it would be irresponsible prosecution and enforcement to overlook in these deserving cases individuals who conceived, planned, acted, participated, benefited, all or a combination of those, in the actual overcharge. And it is only in those cases where we have sought to attach personal liability. This is not something we take lightly.

The CHAIRMAN. Well, I know, but you seek to assure me by saying they conceived, planned, acted and benefited. Now, I've just

gone into this question of benefit, and you say benefit is not a requirement. It was not a requirement of *Citronelle*. In *Citronelle* the individual was liable for the whole thing and his benefit was only a very small portion of it. You don't even allege it in the Guillory case here. So, benefit is not a requirement. You are not using that as a requirement. You're simply not. I mean, the record shows that.

Now, as far as conceived, planned and acted, all you're saying there is that they were conscious about what they were doing even though they did it in good faith, not negligently or all those things. So, why does that reassure me that you are getting the bad guys and letting off the good guys? It looks to me like the good guys are getting caught in this net.

Mr. VAN ORMAN. I would not like you to leave this hearing thinking that in none of the cases we brought did any of the defendants not act in bad faith. There have been a number of cases in which it was shown that the perpetrators of the overcharges knew precisely what they were doing, and they benefited to the tune of millions of dollars from their actions.

The CHAIRMAN. I'm not worried about those guys.

Mr. FYGI. Mr. Chairman, having listened to this, I think one of the problems here is that Mr. van Orman's earlier statement on "benefits" described, say, the family owners of a wholly owned corporation which was the crude oil reseller. And it is the owners of that corporation that were benefiting in the description he offered you earlier. And it is that kind of real world economic analysis I think that even in cases like *Citronelle* or an analysis like *Citronelle* is equally relevant in instances where you are dealing with a shareholder who in *Citronelle*—of the two corporations, he owned either 90 or 95 percent of one and 87½ percent of the other. Analytically I see very little difference between that kind of benefit through dominant ownership in the *Citronelle* case and the kind of benefits with respect to the crude oil resellers that Mr. van Orman described a moment ago. I think it is the same kind of benefit that is being imputed to the sole shareholders is what we are talking about in these reseller corporations, and that is the same kind of basis that seemed to exist in the *Citronelle* case.

The CHAIRMAN. But as I understood *Citronelle,* it wasn't based upon ownership or indirect ownership or the fact that he profited from it, but I think they said in there that it was out of all proportion to what he profited from even indirectly, wasn't it?

Mr. FYGI. Well, he had personal receipt of some of the overcharges, apparently in his capacity as an individual royalty owner of some of the crude oil, almost a separate element of the transactions.

While the court's analysis did not dwell upon or turn on the extent of beneficial ownership in the corporations, nonetheless those facts were indicated by the court in the opinion, and they are relevant I think in two respects. They are relevant as a pertinent feature of the real-world relationships and entirely consistent with the individual dominance of the transactions that the court relied upon. And necessarily they provide the real-world likelihood of an economic stake in the outcome resulting from that high level of

beneficial ownership. But you are correct. The court's reasoning did not expressly turn on that.

The CHAIRMAN. Yes. If this were a requirement of allegation and proof, it would be one thing. Simply because they threw it in the opinion does not make it relevant and, indeed, in your cases, for example, the *Guillory* case, I don't think you alleged that. It is not even alleged in the *Guillory* case. It is not necessary. So, why allege it?

Mr. FYGI. Well, I must add that the *Guillory* case was not within the scope of the review that I conducted pursuant to the Secretary's request.

The CHAIRMAN. Senator Domenici.

Senator DOMENICI. Well, I just wanted to ask with reference to defenses. Perhaps it has been covered here.

In American jurisprudence, there are defenses and challenges to the burden of proof. These have all been kind of a fundamental part of America's natural civility in the evolution of our common law. Now, are these all gone? There are no defenses, no challenge with reference to the burden of proof? Now, maybe I am reading wrong, but that is what I understand.

Mr. FYGI. Well, I am not sure what you are reading that would give you that impression, Senator.

This particular case, in fact, arose out of a lawsuit brought by a citizen and his companies against the government. And in the course of the litigation of the subsequent counterclaims filed by the government, the corporate and individual defendants interposed a variety of defenses and litigated the matter with considerable vigor. It was before the Court of Appeals on two occasions. There were two district court hearings, and it was before the Supreme Court on certiorari request twice, in addition to which in the second certiorari petition the counsel for the petitioner, Mr. Chamberlain received a personal meeting with the Solicitor General himself and sought and received personal review by the Solicitor General of the legal implications of the case.

Senator DOMENICI. Well, I'm not sure that this is an issue as to the effect on restitution law, but rather an issue of whether they are being treated unfairly by the legal system. And it is in that context that I ask what defenses are available to a defendant if he is being prosecuted under the central figure theory.

Mr. FYGI. Well, that is a good question. The most obvious one that occurs to me, of course, is that the particular transactions did not, as a matter of law, violate the regulations in question. And that kind of contention, in fact, was advanced with considerable emphasis in this particular case.

Senator DOMENICI. So, if that is one, you say it was exercised here.

Mr. FYGI. Absolutely.

Senator DOMENICI. But that is the only one you can think of?

Mr. FYGI. Well, that is probably the overarching defense in any kind of proceeding brought by the government, or any litigant for that matter, that the cause of action is ill-founded as a matter of law, just like an insider trading case or the copyright violation that was implicated in the *Sheldon* case that is discussed in my letter of the 18th of May.

Senator DOMENICI. But there is no defense to the liability amount itself?

Mr. FYGI. Well, I would state it the other way around—that the imposition of individual liability is somewhat more the exception than the rule. In the case of corporations and shareholders, the starting point of the law is that they are to be treated separately. And only in equity cases where the particular facts seem to give rise to the need to alter or depart from that approach is imposition of individual liability to be seen. So, it seems to be not the rule, but somewhat the exception, although it has occurred from time to time in a variety of circumstances.

Senator DOMENICI. The personal liability part.

Mr. FYGI. Individual liability for misconduct arising out of violations of Federal law.

Senator DOMENICI. Thank you, Mr. Chairman.

The CHAIRMAN. Gentlemen, thank you very much. I appreciate your coming.

Our next is Professor Junger whom I think will be quite interesting. We are now pleased to welcome a distinguished law professor, Professor Peter Junger, professor of law at Case Western Reserve University. He has for a number of years taught courses in restitution, equitable remedies and natural resources, and has given us a very exhaustive and well-done statement on this case. So, Professor Junger, if you would please summarize, we await with interest what you have to say.

STATEMENT OF PROF. PETER D. JUNGER, SCHOOL OF LAW, CASE WESTERN RESERVE UNIVERSITY

Professor JUNGER. Thank you, Mr. Chairman.

I am not sure what I would have to say would be of that much interest because I am talking as a law professor; I'm not talking about the facts of the *Citronelle* case. What I am concerned with is the holding, and it does get rather technical. And for most of it, I would suggest that people who are concerned with it refer to my written statement. There are some people who are going to follow me who have more interesting stories, human interest, and I think I should get off as quickly as possible.

The points I think that have to be made here are that restitution—and this isn't just a quibble about words. The word "restitution" was applied perhaps for the first time in this context when the Restatement of Restitution came out in the 1930s. It is not a question of words, but this concept that we nowadays call restitution is used to described one remedy and only one sort of remedy. Where A has something and B has a better right to it, then B can get it. The requirement is that A have it and the better right has to be shown. And that's all there is to it.

And for that reason, the central figure theory does not make any sense in the context of restitution. If somebody is unjustly enriched, if somebody receives payments made in violation of the regulations, then it would be perfectly appropriate for the government to bring a restitution action against them even though the person had not done anything wrong. They still were unjustly enriched.

On the other hand, if a person hasn't received benefits hasn't received anything to make restitution of, but he has done something wrong, then certainly he should be punished with penalties. Certainly he would be liable to the private parties whom he had damaged. In a damage action, both in lawsuits, you would have the right to a jury trial, but one couldn't get restitution from him because you can't get something from somebody that they don't have.

[The prepared statement of Professor Junger follows:]

UNITED STATES SENATE

Committee on
Energy and Natural Resources

May 19, 1988

Written Testimony

of

Peter D. Junger

United States Senate
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I. Introduction

A. Qualifications

My name is Peter Junger and I am a professor of law at Case Western Reserve University where, for quite a few years, I have taught courses in Restitution, Equitable Remedies, and Natural Resources.

I am here at the invitation of the Chairman to testify, as an expert on the law of restitution, about the interpretation of that portion of Section 209 of the Economic Stabilization Act of 1970 ("ESA") [12 U.S.C. § 1904 note] that provides: "In addition to ... injunctive relief, the court may also order restitution of moneys received in violation of any ... order or regulation." In particular, I am here to testify that it is my opinion as an expert that the Temporary Emergency Court of Appeals ("TECA") was wrong when it held, as it did in Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (T.E.C.A., 1987), cert. denied, 108 S. Ct. 327 (Citronelle-Mobile II), that an officer or employee of a corporation, who was the central figure in the violation of an order or regulation, can be held liable for moneys that were received by the corporation but not by the officer or employee.

Before I go any further, I should say that I am not the expert on restitution. The expert is George E. Palmer, Professor Emeritus of Law at the University of Michigan, who wrote the book: the four volumes of Palmer on Restitution. I should also say that Professor Palmer sent the Chairman a letter, dated October 23, 1987, in which he expressed his opinion about the subject of my testimony today. That letter has already been published in the Congressional record at 133 Cong. Rec. S. 16281 (daily ed. Nov. 13,1987) and I have annexed a copy of it to my written testimony. I am happy to say that Professor Palmer and I are in agreement.

I am currently writing an article trying to clarify the distinction between the very different remedies of damages and restitution. I intend in that article to refer extensively to the Citronelle-Mobile case, refer to it as the horrible example of what can happen when that distinction is overlooked.

I am also preparing a casebook on Restitution and Equitable Remedies and I intend to include Citronelle-Mobile as one of the

first exemplary cases in that book, again as a horrible example.

In other words, I have had occasion to spend a great deal of time and effort analyzing the issue about which I am testifying.

My academic qualifications include an A.B. from Harvard College and an LL.B. (magna cum laude) from Harvard Law School. Besides teaching law at Case Western Reserve University since 1970, I have taught as a Visiting Professor of Law at Ohio State University and at the University of Miami.

Before becoming a teacher, I practiced law for nine years in New York City with the firm that was then known as Patterson, Belknap & Webb.

As far as down-to-earth experience is concerned, while I was going to college and law school I spent my summers on oil exploration crews in Wyoming, Louisiana, and the North West Territories of Canada working as a jug hustler, drillers helper, and gravity observer.

I have already sent the Chairman two letters, dated October 21 and 27, 1987, in which I stated my opinion, which has not changed, that the TECA's holding in Citronelle-Mobile II that an individual could be held liable for the full amount of overcharges, which that individual never received, "cannot be supported by any conceivable theory of restitution and is contrary to the law and the clear intent of Congress." Copies of these letters are annexed to my written testimony and they also appear in the Congressional Record at 133 Cong. Rec. S. 16281-82 (daily ed. Nov. 13, 1987).

B. The Issue

As I have said, the issue that I am addressing has to do with the interpretation of the restitution provision of ESA § 209, which is part of the larger regulatory scheme established by ESA and by the Emergency Petroleum Allocation Act ("EPAA"), 15 U.S.C. § 751 et seq. That issue is simple, despite the fact that the law of restitution is very complex and confusing.

To be more precise, the issue is simple as long as one sticks to it and does not start worrying about doctors who supply services to patients who die, bona fide purchasers of stolen goods, contracts for the construction of Turkish baths where the owner's copy specifies a lower price than the builder's, a woman who suggests to a soap manufacturer that it should manufacture a soap named "Blue", and all the other delightful problems that we worry about in a course in Restitution and that have nothing whatsoever to do with ESA § 209.

The remedy of restitution is simple, so simple that it existed for several hundred years before the damage remedy was invented. If A gets his hands on something that B has a better claim to, then B can bring an action against A for the restitution of that thing, or for its value.

That is all there is to the remedy of restitution. Since ESA § 209 authorizes the restitution of moneys, we do not even have to worry about the distinction between specific restitution --the restitution of the thing itself--and value restitution--the restitution of its value. The value of one hundred dollars is one hundred dollars.

Complexity and confusion arise only when one tries to figure out in general when the law will hold that B's claim to the thing is better than A's. Frankly, I do not think that anyone will ever be able to come up with a general theory of restitution that can answer that question.

In our specific case, it is easy to tell when the government can bring a successful action against a defendant under ESA § 209 for the restitution of moneys that he has received; that action can be brought in any case where the moneys were received in violation of an order or regulation issued pursuant to ESA and EPAA.

The problem is that TECA held in Citronelle-Mobile II that the government was entitled to "restitution" of moneys from an individual defendant who had never gotten his hands on those moneys. Whatever that particular remedy may be called, it cannot be restitution and it is not authorized by ESA § 209.

No matter how one analyzes the issue, the only possible conclusion is that restitution can be required only of the person who received the moneys. This conclusion is mandated by:

1.) The very meaning of the word "restitution"; and

2.) The statutory scheme, of which Section 209 is only a part, and the evils at which that statutory scheme is directed.

My objection to the holding in Citronelle-Mobile II is not simply academic indignation at the misuse of a technical term, nor is it inspired by any great sympathy for the individual defendant in that case, who, after all, has had his day in court. My objection is that it is an unfair and dangerous precedent which should be overturned by Congress.

Since the government's recovery of moneys that were not received by the defendant cannot be restitution, it must be either a penalty or damages. I believe, therefore, that it would probably be the imposition of an ex post facto penalty, and certainly a denial of due process, to apply that holding to individual corporate officers and employees for violations which occurred before the decision in Citronelle-Mobile II was announced. This difficulty is, of course, one that will become less serious as time goes on.

More importantly, in an action for criminal or civil penalties, or for damages, the defendant is entitled to a jury trial.

The danger is--and this is the important objection--that this precedent authorizing the assessment of damages or penalties in the name of restitution will make it more difficult in the future to enforce price control and other economic regulations. The ability of the government to obtain restitution of moneys received in violation of an order or regulation should not be limited by the necessity of showing that the person who received those moneys violated the regulation.

All that is required under the traditional definition of restitution is that the government show that someone, not necessarily the defendant, committed the violation and that the defendant received moneys resulting from the violation. If the government can also show that the defendant committed the violation, then the government could assess penalties against him and--if the statutory scheme permitted it, which ESA does not--collect damages from him. Liability for restitution should not, however, extend only to those who were parties to the violation.

If Citronelle-Mobile II remains a good precedent, defendants who did not commit the violation, but did receive the moneys, are likely to escape any liability for restitution.

One cannot expect the courts to adopt inconsistent definitions of restitution when enforcing economic regulations: they will either follow Citronelle-Mobile II and hold that "restitutionary" liability requires a showing that the defendant committed a violation--was a "central figure" in the violation--or they will hold that a defendant, no matter how villainous he may be, cannot be held liable for restitution of moneys that he did not receive.

II. Restitution

A. The Meaning of Restitution

Restitution is the name given to a group of legal and equitable remedies that focus on the defendant's status, rather than the plaintiff's. Restitution differs radically from damages, the remedy that focuses on the plaintiff's status, rather than that of the defendant. The damage remedy is used to return the plaintiff to the plaintiff's status quo, to the position that he was in before the defendant injured him. Restitutionary remedies, on the other hand, restore the defendant to the defendant's status quo, to the position that he was in before he received some unmerited advantage.

The definitive characteristic of the remedy of restitution is that the claimant recovers something that the defendant has received, not something that the claimant has lost.

As in the case of ESA § 209 and other statutory regulatory schemes, the law often uses the remedy of restitution to prevent the unjust enrichment of the defendant. In some cases restitution may also serve to compensate the plaintiff for a loss; such compensation, however, is merely a by-product, and is not part of the definition of restitution. Thus, as TECA recognized in United States v. Sutton, a restitution action under Section 209 of ESA "is not, of course, a suit for damages. It is an equitable action, designed to make the defendants 'disgorge' their unjust enrichment." 795 F.2d 1040, 1063 (T.E.C.A., 1986), cert. denied, 107 S. Ct. 873. And as TECA held in Citronelle-Mobile Gathering, Inc. v. Edwards (Citronelle-Mobile I):

> Actions by the United States under ESA § 209 are taken to enforce public, not private, rights. Thus, compensation is 'a by-product of the agency's effort to re-establish compliance with its regulatory scheme.' ... The central purpose of restitution is to determine the amount by which the wrongdoer has been unjustly enriched, and then to make him disgorge that amount. No proof is required that the plaintiff was damaged, much less the amount of any damage:
>
> > Restitution is generally awarded only in order to deprive the defendant of enrichment obtained at the plaintiff's expense ... the general requirement does not mean that the gain to the defendant need be equated to the loss of the plaintiff, nor indeed that there need be any loss to the plaintiff ....
>
> Restatement of Restitution, Sec. 1, Comment e (1937), cited in Sauder v. Doe, 648 F.2d 1341 (TECA 1981).

669 F.2d 717, 722 (T.E.C.A., 1982), cert. denied, 459 U.S. 877.

Now if TECA had consistently adhered to its position--the correct position--that a suit under ESA § 209 is one for restitution, not damages or a penalty, I would not be testifying here today. Unfortunately, in a series of cases including Sutton and culminating in Citronelle-Mobile II. TECA has held that an employee or officer who was instrumental in violating an order or regulation, but did not himself receive any of the moneys, can be required, under ESA § 209, to make "restitution" of all the moneys received by his employer as a result of the violation.

That holding, of course, is not consistent with restitution. As Professor Palmer said in his letter of October 23, 1987: "The court rests its decision on the theory that the ... [employee] was the 'central figure' in the wrongful sales. This might support recovery of the amount of the overcharges as damages ... but in my opinion such a recovery is not permissible under the common law of restitution."

B. The 'Central Figure' Theory:
Confusing Restitution with Damages and Penalties

It is difficult to explain how TECA could have reached its remarkable holding in Citronelle-Mobile II. Probably one should begin with an examination of the first opinion of the District Court in the Citronelle-Mobile litigation, Citronelle-Mobile Gathering, Inc. v. O'Leary, 499 F. Supp. 871 (S.D. Ala., 1980), aff'd as modified, Citronelle-Mobile Gathering, Inc. v. Edwards, 699 F.2d 717 (T.E.C.A. 1982), cert. denied, 459 U.S. 877.

In O'Leary the court held:

> When a corporate officer or director is a central figure in tortious conduct, or when he authorizes, participates and approves of that conduct, he is subject to liability based upon that conduct.... This doctrine does not depend upon the same grounds as piercing the corporate veil, that is, inadequate capitalization, use of the corporate form for fraudulent purposes, or failure to comply with formalities of organization.... Rather, the officer or director is liable as an actor, not an owner....
>
> Chamberlain was a central figure in the sales of crude oil by Gathering and Services. He is therefore subject to liability for any violations of the EPAA in those sales. Because restitution is predicated upon a finding of unjust enrichment, however, Chamberlain would be individually liable only to the extent that he received proceeds from

those sales. See 1 G. Palmer, Law of Restitution §§ 2.1, 2.10 (1978).

499 F. Supp. at 881.

There is no confusion here. The District Court correctly held that, under the restitution provision of ESA § 209, a defendant is individually liable "only to the extent that he received proceeds" from the sales made in violation of EPAA. Only with hindsight can one regret the reference to the fact that that defendant was a "central figure" in those sales.

To hold a defendant liable for either penalties under ESA § 208 or damages under ESA § 210, it would be necessary for the court to find that the defendant was a central figure in the violation, that the defendant committed the wrong. In a damage action the plaintiff would also have had to prove the amount of the damages that he suffered.

Since the individual defendant was a central figure in the violations, he could have been subjected to penalties under ESA § 208, the statutory provision for sanctions that was in force at the time of the violations. (If the violations had occurred after the 1975 amendments to EPAA, he could have been subjected to the penalties provided in 15 U.S.C. § 754(a), subsections (a)(3) and (a)(4).) The district court, however, found that the violations were not willful and declined to impose such sanctions.

Since the individual defendant was a central figure in the violation, he could have been held liable in an action for damages under ESA § 210 in a suit by a private party. (The government may not sue for damages under the statutory scheme of ESA and EPAA, as is made clear by the legislative history of § 210. See S. Rep. No. 92-507, Nov. 20, 1971, reprinted in 1971 U.S. Code Cong. & Admin. News 2283, 2291.)

To hold a defendant liable for restitution under ESA § 209, however, it was not necessary to find that the defendant was a central figure in the violation. All that the government had to prove was that there were sales made in violation of EPAA and that the defendant received the proceeds of the sale.

Because the government in an action for restitution need not show that the defendant committed the violation, restitution is the most important weapon that the government has in regulatory enforcement proceedings. But the reason that the government does not have to show that the defendant committed the violation, is that, as the District Court held in O'Leary, the defendant is liable only for the proceeds that he received.

One can, however, scarcely blame the District Court for emphasizing that the individual defendant was a central figure in the violation. Judges in their opinions should do more than demonstrate that their results are legally correct; they should also demonstrate that they are equitable. Although it is clear that a person who receives moneys as the result of a violation may be held liable to make restitution of those moneys, a court of equity will refuse to order that restitution if the result would be inequitable.

The District Court reached the right result in holding that a defendant, even one who was a central figure to the violation, cannot, in restitution, be held liable for more than the proceeds that he received. Yet TECA in Citronelle-Mobile II, relying on its earlier opinion in Sauder v. D.O.E., 648 F.2d 1341 (T.E.C.A., 1981), "rejected the argument that the common law concept of restitution does not permit a court to order an infringer to refund benefits never received by that individual," [826 F.2d at 27] and concluded:

> Because a corporate officer's unlawful conduct may form the basis for personal liability if the equities of the case demand it, as they do here, we conclude that the principle of Sauder applies to require us to rule that Chamberlain [the corporate officer] is fully responsible for making restitution to the injured parties.

826 F.2d at 28. [emphasis added]

The Sauder case, however, has nothing to do with the issue that I have been asked to testify about. The issue in Sauder was whether the part owner and "operator" of several informally unitized oil and gas leases could be held liable for restitution of overcharges in violation of EPAA that were received by the unit, including those which were not paid directly to the operator.

It is clear that the unit was obligated to make restitution of these overcharges. The question was whether the part owner and operator, who was the "animating figure" in the violation, could be held jointly and severally liable for this obligation of the unit. This issue, of course, involves the law of unincorporated associations, another very complex and confusing subject and one in which I claim no expertise.

It is possible that the opinion in Sauder is wrong, but, considering that partners are jointly and severally liable for obligations arising from torts and that the obligation of the unit to make restitution arose from the operator's violation, I find the opinion unobjectionable, especially considering the

procedural burdens that would be placed on the government if it were required to sue all of the other venturers who had interests in the unit.

In Sauder TECA said:

> Sauder owns a 34 percent interest in the Rossillon lease and a 41 percent interest in the Babinger-Perrier lease. Of all the working interest owners, his is by far the largest single holding. He is the sole operator of the leases and has been the animating force behind the continued production at the Bradfield Pool. Significantly, it was Sauder who certified to Mobil Oil that the output of the leases was stripper well oil subject to the exemption. It can fairly be said that it was he who caused the overcharges.
>
> In these circumstances, we think that it is within the authority and discretion of the agency to hold the owner-operator of a lease liable for the full amount of the overcharge. To require the agency to seek refunds from each individual property owner would place a heavy burden on the agency, limiting its ability to repair infractions of its pricing rules. Shifting the burden to one in Sauder's position of responsibility aids the task of enforcement without working unfairness.

648 F.2d at 1347-48. [emphasis added]

No such rationale of administrative convenience can be invoked to justify the imposition of liability on a corporate officer or employee to make restitution of proceeds that were received by the corporation. In cases like Citronelle-Mobile the corporation is the obvious person to sue for the overcharges; the problem in Sauder was that a joint venture, partnership, mining partnership, oil and gas unit, or other unincorporated association is not a person.

Right or wrong, however, Sauder was the case in which TECA began to confuse liability for damages or penalties with liability for restitution:

> [E]ven if the statute [ESA § 209] is construed strictly, it appears that the agency's action is within its grant of authority. "In equity, restitution is usually thought of as a remedy by which defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." (emphasis added). Moore's Federal Practice, Vol. 5, P38.24[2]. "[A] person who has been unjustly deprived of his property or its value ... may be entitled to maintain an action for restitution against

another although the other has not in fact been enriched thereby." Restatement of Restitution, § 1, comment e, page 15. Here the agency seeks only "to restore the status quo" and "to set things right." It does not seek to recover Mobil's damages, which may or may not be the amount of the overcharges, but asks Sauder to make restitution of the precise amount of the overcharges paid to all property owners plus interest.

Nor do we believe that Congress intended to limit the agency's and courts' power to restore overcharges. The legislative history indicates that the explicit reference to restitution in § 209 was to settle any doubt that "there was an inherent equitable power in the court to set things right and order restitution." S. Rep. No. 92-507, supra, reprinted in 2, 1971 U.S. Code Cong. & Admin. News 2283, 2291. There is no indication, however, that the section thereby attempts to limit the power of the courts or the agency to restitution or to a particularly strict interpretation of restitution. "Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied." Porter v. Warner Holding Co., 1945, 328 U.S. 395, 398.

Id. at 1348.

It is, of course, not only a strict interpretation of restitution which says that one cannot be required to make restitution of proceeds one has never received. The definition of restitution itself says that.

It is, of course, true that the legislative history of ESA § 209 does not limit the government's remedies under that section solely to restitution; § 209 also provides another form of equitable relief: the injunction. It is the legislative history of ESA § 210, the section that permits private parties to bring damage actions, which makes clear that the government may not sue for damages:

This action [pursuant to ESA § 210] is intended to be brought by private persons against other private persons. The government will not bring such action nor be the subject of one.

S. Rep. No. 92-507, Nov. 20, 1971, reprinted in 1971 U.S. Code Cong. & Admin. News 2283, 2291.

It is the history of equity and our constitutional liberties that makes clear that a court of equity will not impose penalties

for crimes or other violations. Penalties are only imposed by courts of common law. That has been so ever since the Court of Star Chamber was abolished.

The Warner Holding case did involve price controls; the defendant was required to make restitution of the overcharges that it had received. Similarly, all of the cases--except one, which did not involve restitution, but rather an affirmative injunction to repair a castle--cited by Moore following the passage quoted from his Federal Practice, involved restitution to enforce economic regulations. None of these cases required a defendant to make restitution of proceeds that he had not received.

The quoted passage from Comment e to Section 1 of the Restatement, as the examples following it make clear, has nothing to do with the issue under consideration. The examples involve restitution for services performed by a doctor whose patient died and restitution for stolen goods purchased by a bona fide purchaser. In both examples the defendant was required to make restitution of the value of the services or goods that he had received.

Thus if Sauder holds that restitution can be required of moneys that were never received, it is wrong. If, on the other hand, Sauder holds that an operator of a unit can be held jointly and severally liable for the unit's obligation to make restitution of moneys that it received, that holding is unobjectionable, at least in so far as the law of restitution is concerned. But the latter holding cannot justify holding an employee, officer, director, or stockholder of a corporation liable for an obligation of that corporation to make restitution of moneys that it received. There is a fundamental difference between corporations and unincorporated associations.

In Citronelle-Mobile II, however, TECA seems not to have grasped this distinction:

> We recognize that the finding of liability is premised upon a "central figure" theory here, and upon an "operator" theory in Sauder. But the distinction is without a material difference. "Central figure" theory is the specific language of the corporate-director realm, whereas "operator" theory need not be so specifically applied. The theories accomplish the same thing by holding responsible the primary instruments of illegal conduct.

826 F.2d at 27.

TECA further compounded the confusion in the Sutton case. In Sutton, as in Citronelle-Mobile, the proceeds of a violation were received by a corporation. But in Sutton the corporation was a sham. TECA quite properly "pierced the corporate veil" and held that individual defendant Sutton was the "alter ego" of the corporation. Thus all moneys received by the corporation were also received by Sutton, and thus Sutton was liable for all overcharges received by the corporation.

Unfortunately in Sutton TECA went on to say:

> In addition to piercing the corporate veil, the district court found that Sutton was liable on account of his own tortious conduct. The finding that Sutton was the central figure in the miscertification scheme is supported by substantial evidence. Liability for tortious conduct depends upon the individual's acts, and not upon any theory of vicarious liability based upon mere status as an owner or other party responsible for corporate activities. A shareholder may be liable if he is the "central figure" in a corporation's tortious conduct. [Citing Citronelle-Mobile Gathering, Inc. v. O'Leary]
>
> The evidence fully supports the district court's conclusion that Robert Sutton is jointly and severally liable with his corporate defendants because these corporations were Sutton's alter egos and because Sutton personally engaged in tortious conduct....

795 F.2d at 1060-61.

In Sutton, TECA went on to say that: "A person who is the "animating force" for regulatory violation is fully liable even though he does not personally receive all benefits of his illegal activities." Id. at 1063. And Sauder was cited as support for this proposition.

Sutton, unlike Sauder, does appear to hold that an officer and stockholder of a corporation may be held liable for all of the moneys received by the corporation in violation of an order or regulation. But since Sutton was held to be the alter ego of the corporation, Sutton did receive all the moneys that were received by the corporation. The result in Sutton was clearly correct, although TECA's reliance on the central figure theory in that case was not well founded.

It is important to realize that the defendant in Sutton, having been found to be the alter ego in the corporation, had little reason to contest TECA's holding that he was liable for all the proceeds received by the corporation. There was, after

all, no danger that the court would require him to make restitution more than once.

Sauder and Sutton together supply the authority for the decision in Citronelle-Mobile II, holding that an officer and stockholder of a corporation, who was not the alter ego of the corporation, but was the central figure in a violation, could be held liable under ESA § 209 for all the moneys received by the corporation as a result of the violation.

The District Court in its original decision, Citronelle-Mobile Gathering, Inc. v. O'Leary, granted partial summary judgment for the government, the counter-plaintiff, and the counter-defendants appealed to TECA. The issue that we are concerned with was not raised on that appeal, but another issue involving restitution was.

The District Court in O'Leary had ordered that the amounts paid as restitution should be paid into the Treasury of the United States, since the purchasers who paid the overcharges had aided and abetted "the defendants in their violation of the pricing regulations for their mutual benefit" and thus they, and the government on their behalf, would be barred from a restitutionary recovery by their "unclean hands." In Citronelle-Mobile I, however, TECA said:

> Federal district courts unquestionably possess broad discretion in fashioning equitable remedies, ... but, as contemplated in the exercise of these powers to remedy civil wrongs and restore civil rights, the authority is vested to make the victims whole, "so far as possible, and restored to a position where they would have been had it not been for" the unlawful violation, such as was practiced here. It follows that payment to the United States Treasury is not restitution, in the true sense of the word, or in the objectives of the statutes here involved.

669 F.2d at 723. And remanded the case to the District Court.

Since, in my opinion, the primary purpose of restitution under a regulatory price control scheme like ESA is not to make the victims whole, but rather to deprive the violators of their unjust enrichment, this holding appears misguided, especially in a case like Citronelle-Mobile where the buyers were in pari delictu and there was no showing that there were any other victims.

It may have been this mistaken concern for the rights of "victims" that lead TECA in Citronelle-Mobile II to hold that the individual defendant "is fully responsible for making restitution

to the injured parties." This emphasis on injury is consistent with the granting of damages; it has no place, however, in restitution.

Although I believe that the holding in Citronelle-Mobile II is wrong and a dangerous precedent, I do not think that TECA should be faulted for reaching the result it did. The defendants in that case apparently spent most of their time attempting to relitigate the issues that were decided in Citronelle-Mobile I. It appears, moreover, that the defendants' attorneys were also confused by the relation between restitution and the central figure theory. Their primary argument against the imposition of restitutionary liability on the corporate officer for moneys that he had not received, was an argument that I find silly: they claimed that the central figure theory applied only to common law torts and that the violation of a regulation issued pursuant to ESA and EPAA is not a tort.

Undoubtedly the government, in what Justice Jackson once described as "the very proper zeal of its lawyers to win their case" [Dalehite v. United States, 346 U.S. 15, 47, 50 (1953) (dissenting opinion)], did not feel compelled to stress how far the TECA was moving from the traditional understanding of restitution.

III. The Statutory Scheme

After this rather long-winded explanation of the meaning of restitution in the context of ESA § 209, I can imagine that some might be wondering if TECA was not right in holding that the central figure in a violation should be liable for all the overpayments, even those that he did not receive. Why should respect for the definition of restitution prevent the courts from from ordering restitution to the injured parties under ESA § 209?

One answer is that the statutes passed by Congress neither contemplate nor permit such a result.

There is nothing magic in the word "restitution." Congress could just as easily have used another word. For example, instead of speaking of "restitution," ESA § 209 could just as well have provided: "[T]he court may also order repayment of moneys received in violation of any such order or regulation." In fact, if there had been no express provision for restitution, under its own or any other name, the provisions of ESA § 209 authorizing mandatory injunctions would still have allowed the courts to order restitution of overcharges that violated an order or regulation. I can say this with confidence because ESA originally did not contain the provision for restitution, yet in United States v. Lieb, 333 F. Supp. 424, 429 (W.D. Texas, 1971),

aff'd 462 F.2d 1161 (1972), a rent control case, the court entered the following order:

> The defendant is hereby ORDERED and mandatorily enjoined to restore the rents charged by him for each apartment to the level charged by him for the same apartment during the thirty-day period ending August 14, 1971, and to restore the status quo ante by making restitution to all tenants of all rents charged and received in excess of those amounts which were charged and received during the thirty-day period ending August 14, 1971 ....

Ever since Porter v. Warner Holding Co., 328 U.S. 395 (1946), it has been established beyond question that the government has the right to restitution of overcharges made in violation of price control laws, at least in cases where those laws allowed, as they always do, the government to seek injunctive relief.

It should be kept in mind that Congress's purpose in passing the Economic Stabilization Act was to stabilize the economy. In its original 1970 version the enforcement provisions were in §§ 204 and 205. § 204 provided the penalty, the $5,000 fine for willful violations; this provision became part of § 208 in the 1971 amendments to the act (later § 208 was replaced by the more stringent penalty provisions of EPAA, now found in 15 U.S.C. § 754, subsections (a)(3) and (a)(4)). § 205 contained the provisions for injunctions that in the 1971 amendments became part of § 209, the other part of that section being the new restitution provision that is the subject of my testimony. Suits under § 205 could only be brought by the Attorney General at the request of a person authorized by the President to exercise authority; this limitation still applies to § 209. There was no provision for damages. Congress when it passed these provisions clearly did not intend to give private individuals a remedy for overcharges, rather the entire statutory scheme was directed toward the enforcement of orders and regulations issued under the authority of ESA, and later of EPAA.

The fact that penalties could be assessed only for willful violations and the fact that the maximum penalty was a fine of only $5,000 demonstrate that Congress did not rely on penalties as the major means of enforcing price control regulations promulgated under ESA.

This reluctance to rely on harsh penalties in the enforcement process is understandable. Price control regulations mandate behavior that economists would call "irrational," behavior that would in many cases, were there no price control regulations, violate the antitrust laws. Selling goods at the best price one can get is required by a competitive market; it is

certainly not malum per se.

This explains why Congress in adopting the enforcement provisions of ESA opted, not to rely on penalties, but rather simply to make violations unprofitable by requiring the disgorgement of overcharges. There was no intent to punish any but willful violators; on the other hand, there could be no effective enforcement unless those who received them were forced to disgorge the profits resulting from the violation.

The major means of enforcement was clearly intended to be the equitable remedies that were originally in § 204 and are now contained in § 209. Though the government's lawyers and TECA may have felt that these provisions were not stringent enough, they were the provisions passed by Congress and they were quite adequate to accomplish Congress's purpose, which was to prevent violations, not to punish violators and certainly not to supply private parties with a damage remedy. (The damage remedy was added in 1971 simply to provide an additional means of enforcement.)

If a violation was threatened, the government could get an injunction. If a violation occurred, the government could get a mandatory injunction ordering restitution. There was no need for extensive penalties; restitution would deprive violators of their unjust enrichment and thus take the profit out of violations.

It is this simple and effective enforcement scheme that is threatened by TECA's holding that a central figure in a violation can be ordered to make "restitution" of benefits that he never received.

The magnitude of the distortion that can result from this holding is perhaps best shown by noting that a buyer--the person who makes the overpayment--may well be a central figure in the violation. That may have been the case in Citronelle-Mobile; we know that the buyer in that case was found to be in pari delictu with the defendant sellers. If TECA were to apply its "central figure" theory consistently, in such cases it would have to order the buyer to make restitution of moneys that he had paid.

The most cursory examination of the statutory scheme shows that that was not the intent of Congress.

CASE WESTERN RESERVE UNIVERSITY · CLEVELAND, OHIO 44106

October 21, 1987

Senator J. Bennett Johnston
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Johnston:

Thank you for your kind letter of October 5, 1987. I am afraid that I am not quite as far along with my article on "Retributory Restitution" as you suggest, but I am happy to have this opportunity to state the conclusions I have reached with respect to Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (T.E.C.A. 198[illegible]).

As far as I know, Citronelle-Mobile is the only case in Anglo-American jurisprudence in which a court has knowingly ordered a party to make restitution of a benefit that he never, even constructively, received. The conclusion of the Temporary Emergency Court of Appeals ("TECA") that Bart B. Chamberlain is personally liable "for the full amount of overcharges, $6,769,956.76," which he had never received, cannot be supported by any conceivable theory of restitution and is contrary to law and the clear intent of Congress.

TECA apparently reached its mistaken conclusion because it did not understand the difference between the remedy of damages and that of restitution. This distinction is critical to an understanding of the Citronelle-Mobile case, because the government's claim, and TECA's jurisdiction, was based on the last sentence of section 209 of the Economic Stabilization Act of 1970, as amended ("ESA"), which provides:

> In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any ... order or regulation [under the price control laws].

Damage actions by the government, on the other hand, are not authorized by section 209, as is made clear by ESA section 210 which authorizes a damage action by the person who paid the overcharges; the legislative history of section 210 makes clear that:

> This action is intended to be brought by private persons against other private persons. The government will not bring such action nor be the subject of one.

S. Rep. No. 92-507, Nov. 20, 1971, reprinted in 1971 U.S. Code Cong. & Admin. News 2283, 2291.

The critical difference between damages and restitution is that damages are measured by the claimant's loss, while restitution is measured by the defendant's gain. It is easy to see why Congress did not permit the government to sue for damages for violations of the price control laws: the government could never show any calculable damages in such a case. It is also easy to see why Congress (and the courts; see, e.g., Porter v. Warner Co., 328 U.S. 395 (1946)) have authorized the government to obtain restitution of overcharges made in violation of the price control laws: otherwise it would pay violators to pay the penalties and keep the overcharges--in Citronelle-Mobile, for example, no penalties were assessed, while the overcharges were in excess of $6.75 million.

As the Supreme Court said in Snepp v. United States, 444 U.S. 507, 515 (1980), a case where the government sought restitution, in the form of a "constructive trust" (the technical name for restitutionary relief of the type authorized by ESA Section 209), of the profits received by a former CIA agent from the sale of a book which he published in violation of his fiduciary duty to the United States:

> A constructive trust ... protects both the Government and the agent from unwarranted risks.... It deals fairly with both parties by conforming relief to the dimension of the wrong.... If the agent published unreviewed material in violation of his fiduciary and contractual obligation, the trust remedy simply requires him to disgorge the benefits of his faithlessness. Since the remedy is swift and sure, it is tailored to deter those who would place sensitive information at risk. And since the remedy reaches only funds attributable to the breach, it cannot saddle the former agent with exemplary damages out of all proportion to his gain.

444 U.S. at 515-16. Yet, in Citronelle-Mobile, TECA required Chamberlain to disgorge benefits that he had never received and, in effect, saddled him with exemplary damages out of all proportion to his gain.

TECA justified its holding that Chamberlain (who did not receive the overpayments) and the corporate counter-defendants

(which did) were "jointly and severally liable for the full amount of the overcharges" (826 F.2d at 31) on the authority of a series of cases where individual defendants, officers of corporate defendants, were held liable for damages, two of its own earlier opinions, and its misconstruction of a misleading comment in the Restatement of Restitution.

The theory that TECA adopted in Citronelle-Mobile was that:

> Chamberlain is a 'central figure' in the misconduct of the corporation insofar as his misconduct has brought about the corporate violations of crude oil pricing laws.

826 F.2d at 23. The court expressly stated that:

> [l]iability is premised only on a finding that Chamberlain committed the wrongful acts.

Id. This "central figure" theory does support the finding that Chamberlain committed the wrongful act and that finding in turn would justify holding Chamberlain liable for the damages caused by his wrongful acts, but--again--a damage action cannot be brought by the government pursuant to ESA. The fact that Chamberlain's acts caused damages cannot justify a restitutionary award against him; in fact, as TECA repeatedly recognized, quoting from its earlier opinion in the same case, in an action for restitution

> [A]s this court has already said, "[n]o proof is required that the plaintiff was damaged, much less the amount of any damage." Citronelle-Mobile, 669 F.2d at 722."

826 F.2d at 29; see also, id at 23. In order to justify the restitution order against Chamberlain, the government would have had to prove that he had received the benefits of his misconduct--that he had received the "moneys received in violation" of the pricing order; that, of course, could not be proved, with or without the help of the "central figure" theory.

It follows that none of the damage cases relied on by TECA to establish the "central figure" theory is authority justifying the restitution decree against Chamberlain.

One of the earlier TECA opinions relied on by the court in Citronelle-Mobile was United States v. Sutton, 795 F.2d 1040 (T.E.C.A. 1986), cert. denied, ___ U.S. ___, in which, relying in part on its first opinion in the Citronelle-Mobile case, the court held that Sutton, a corporate officer and stockholder--like Chamberlain--was liable in a restitution action pursuant to ESA

section 209 on two separate theories, one right and one--the "central figure" theory--wrong. In Sutton the court said:

> The evidence fully supports the district court's conclusion that Robert Sutton is jointly and severally liable with his corporate defendants because these corporations were Sutton's alter egos ["piercing the corporate veil" theory] and because Sutton personally engaged in tortious conduct ["central figure" theory].

795 F.2d at 1061. Since the court in Sutton found that Sutton was the "alter ego" of his corporations, he received all the benefits received by them and was thus liable to make restitution. To the extent, however, that Sutton holds that a party who did not receive a benefit can be required to make restitution of that benefit under a "central figure" theory, it is as misguided as Citronelle-Mobile itself.

The other TECA case relied on was Sauder v D.O.E., 648 F.2d 1341 (T.E.C.A. 1981), which did not involve a corporate officer who was the "central figure" in a wrong committed by his corporation. Sauder did not involve any corporations. The court in Citronelle-Mobile said:

> In Sauder, we rejected the argument that the common law concept of restitution does not permit a court to order an infringer to refund benefits never received by that individual. 648 F.2d at 1348. We refused to characterize the decision to hold Sauder fully responsible in restitution as an attempt to award damages to the victimized party. Rather, we imposed liability in such a manner as to restore the precise amount of the overcharges, "to set things right." 648 F.2d at 1348.

826 F.2d at 27. If this is a correct characterization of the Sauder holding, then that case is also as misguided as Citronelle-Mobile; refusing to characterize damages as damages does not keep them from being damages.

I suspect, however, that Sauder may have been correctly decided--if not for the right reasons--and it is certainly easy to distinguish it from Citronelle-Mobile.

Sauder was "the part owner and operator of three oil leases ... [which] were operated as a single unit"--without benefit of a unitization agreement. 648 F.2d at 1342. Since our library contains no up-to-date treatise on oil and gas law, I cannot readily determine what the liability of the operator of such a unit is. If he is treated as a partner (or a joint

venturer) in the unit, he would be liable for the debts--including those arising on restitutionary theories--of the partnership (or joint venture). I would, myself, expect the operator to be held liable for all the debts of the unit as if he were the general partner of a limited partnership. I would not, however, be surprised if the law in this area is unsettled; if that is so, perhaps I will have to write another article.

In any event, an operator of an oil and gas lease or unit like Sauder bears little resemblance to a corporate officer like Chamberlain. The Sauder court justified holding Sauder liable for all of the unit's overcharges on the grounds of administrative convenience:

> To require the agency to seek refunds from each individual property owner would place a heavy burden on the agency.

648 F.2d at 1348. This rationale cannot, of course, be applied to Citronelle-Mobile, for in that case the corporations were the obvious parties to make restitution; no administrative convenience was served by extending liability to Chamberlain.

As to the comment from the Restatement, the court said:

> "Ordinarily, the measure of restitution is the amount of enrichment received." Restatement of Restitution § 1 comment a (1937). However, restitution also can serve "to restore the status quo." ... [quoting Sauder] "[A] person who has been unjustly deprived of his property or its value ... may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby." Restatement of Restitution § 1 comment e (1937).

It is, of course, true that restitution can, and usually does, serve to restore the defendant to the status quo by depriving him of his undeserved gain. Damages, on the other hand, restore the claimant to the status quo by making good his loss. This is just another way of stating the distinction between restitution and damages, the distinction that the court ignored when it required Chamberlain to make restitution of benefits he had never received.

Comment e to section 1 of the Restatement of Restitution refers to a case where A has converted B's goods and sold them to C. In such a case, if C refuses to return the goods, B, their owner, may sue either for damages (the tort of conversion) or for restitution of the goods or their value. If C paid full value for the goods, one can argue that he was not enriched by his

innocent conversion, but the fact remains that he did receive B's goods. Chamberlain, on the other hand, did not receive anything whatsoever, so this comment can have no application to his case. Palmer in his treatise on Restitution takes the position that C actually is enriched, claiming that

> the fact and amount of a defendant's enrichment can be ascertained only in the context of a legal system, here by reference to rules relating to title to chattels.

1 Palmer, Restitution 59 (1978). In any event, this academic dispute has no bearing whatsoever on the issue of whether the court's treatment of Chamberlain was correct. It wasn't.

If you desire to amend ESA to overrule Citronelle-Mobile and make clear that a defendant may not be compelled to make restitution of moneys that he never received, I would suggest that the last sentence of ESA section 209 be amended to read as follows: "In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation, but only from the person who received such moneys." Since this is clearly what was intended all along, I find it unsettling that any court could so misconstrue section 209 as to make this proposed amendment necessary.

Very truly yours,

Peter D. Junger

Peter D. Junger
Professor of Law

CASE WESTERN RESERVE UNIVERSITY · CLEVELAND, OHIO 44106

October 27, 1987

Senator J. Bennett Johnston
Chairman
Committee on Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Johnston:

This will supplement my letter of October 21, 1987 since there are two matters which I should, perhaps, have mentioned but which--since I did not want to use footnotes--I decided to exclude from that letter:

1. Chamberlain did receive a small portion of the overcharges, and the trial court held that the government was entitled to restitution of, and only of, the amount of those overcharges. Though I did not discuss those overcharges in my letter, it is, of course, my opinion that the trial court was correct and that Chamberlain was obligated to make restitution of the amounts that he actually received.

2. TECA's assesment of prejudgment interest at the prime rate, a rate far in excess of the legal rate and probably of any rate of return that Chamberlain's companies could in fact have earned suggests that that court applied its misconception of restitution to the corporate counter-defendant's as well as to Chamberlain. I find difficulty in reconciling this portion of the Citronelle-Mobile decision with decisions like SEC v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1104-05 (2d Cir. 1972).

School of Law

I would also like to amplify my statements with respect to the Sauder case. Further research convinces me that Sauder was properly held liable as a partner in the unit, that is, as an operating partner in a mining partnership; cf., e.g., Blocker Exploration Co. v. Frontier Exploration, Inc., 740 P.2d 983 (Colo. 1987) and cases therein cited.

Finally, I wish to assure you, as I failed to do in my first letter, that I will send you a copy of my article as soon as it is finished.

Very truly yours,

Peter D. Junger

Peter D. Junger

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October 23, 1987

Senator J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Senator Johnston:

Mr. Joel Saltzman has asked me to write you primarily in connection with the decision of the Temporary Emergency Court of Appeals in Citronelle-Mobil Gathering, Inc. v. Herrington, decided May 7, 1987. The United States sought restitution of overcharges on the authority of 12 U.S.C. § 1904 Note and the court upheld recovery from the individual Chamberlain of all overcharges by the corporations, even though he had received for his own benefit only a portion of those overcharges. This could be upheld as a proper case for restitution if the court were to pierce the corporate veil but it did not do so. The Government must have assumed, correctly I believe, that the facts did not support a piercing of the corporate veil.

I see no other basis for requiring Chamberlain to make restitution of moneys he did not receive. The court rests its decision on the theory that Chamberlain was the "central figure" in the wrongful sales. This might support recovery of the amount of the overcharges as damages (which evidently the Government cannot recover under the statute) but in my opinion such a recovery is not permissible under the common law of restitution.

The court relied on a statement in the Restatement of Restitution § 1, comment e (1937), but that statement is of very limited significance and does not justify the court's decision. The statement is concerned solely with situations in which there has been a transfer of goods or services from plaintiff to defendant; the usual measure of recovery in a restitution action is the fair market value of the goods or services, and that is the measure used in the two examples given by the Restatement. In one the physician recovers the reasonable value of his services even though his patient dies. In the other the owner of a chattel recovers the value of the

chattel even though the defendant purchased it in good faith from a thief. In the law of property the defendant got no title. The owner can recover the chattel simply because it is his, or alternatively he is entitled to restitution of its value. The defendant lost his money when he bought the chattel and cannot recapture his loss at the true owner's expense.

None of this supports the court's conclusion in the Citronelle case that the United States is entitled to restitution of overcharges never received by the individual Chamberlain.

Yours truly,

George E. Palmer

George E. Palmer
Professor Emeritus of Law

GEP:ml

The CHAIRMAN. Now, under the restitution theory—and we just discussed a moment ago—suppose the benefits are in salary or in stock aggrandizement, increased value and all of that. Under restitution can you go to those indirect——

Professor JUNGER. There are plenty of cases that say you can trace the benefits. As I understand, in the actual cases—certainly in *Citronelle*—no effort was made to trace those benefits. If they had gone after the stockholder and said, well, the value of your stock appreciated, and that was the basis on which they sought restitution, maybe they should have gotten it, maybe they shouldn't have. But there wouldn't be any problem. But they were only looking at the payments he didn't receive.

And the holding is what I'm concerned with. The holding says that a person can be held liable in restitution, in equity proceeding for restitution, without a jury trial to require him to turn over matters that he did not receive. Now, normally restitution is allowed. The remedy is there to deprive a person of unjust enrichment, and that is the reason why the Economic Stabilization Act provides for restitution.

The CHAIRMAN. Well, let me make one thing clear before you go further, and excuse me for interrupting. But in your letter to me of October 21 you say, "As far as I know, *Citronelle-Mobile* is the only case in Anglo-American jurisprudence in which a court has knowingly ordered a party to make restitution of a benefit that he never even constructively received." Does that continue to be correct?

Professor JUNGER. There may be one case that was mentioned today that one could quibble about. And that case is the Texas Gulf Sulfur case. But still, I would say the statement is true even after my attention was brought to the *Texas Gulf Sulfur* case because in that case you had a tippee and a tipper. And the tipper, the person who divulged the information that he shouldn't have divulged in violation of rule 10(b)(5), was held liable for the tippee's profits.

The reason the court did it—they said it was hard. They admitted it was hard, but they said otherwise they wouldn't be able to scoop up the profits and you would end up with a situation where one person tipped one day and then his friend tipped back the next day, and you could never take the profits out of the operation. And it seems to me what they were treating the tipper and the tippee as was partners. Of course, in a partnership a person is liable for the entire wrongful gains of the partnership in a wrongful transaction.

There are lots of cases like that we have heard about today in this context. All the cases involving operator liability are cases where the operator of a field as an agent for the other parties or as a partner of the other parties who have interest in the field was held liable. The unit is liable for the restitution. The operator is liable because he is liable for the debts of the unit. And I would say that the tipper and the tippee together were liable for those profits and the one who was in front of the court was the one who was made to pay it.

Another very big distinction in that *Texas Gulf* case is that the problem the court had and the only reason they allowed restitution against the tipper for the tippee's profits was the tippee wasn't before the court. But as I understand, in all these cases the corpo-

ration, which received the profits, was before the court. And yet, they are going after private individuals.

The CHAIRMAN. Was the *Citronelle* case wrongly decided in your view?

Professor JUNGER. The holding in the case, the particular holding that a director and officer can be held liable for moneys that he didn't receive in my view is as wrong as a decision can be.

The CHAIRMAN. As wrong as a decision can be.

Professor JUNGER. And I don't think this is just a professor talking about the way the law should be to keep the theory straight. The problem is that if people are going to be penalized, they have a right to jury trial. They have to have the penalties in accordance with law.

What I was hearing today, I'm afraid, was talk about, well, we'll decide as a matter of equity when a person should be punished. And equitable punishment is totally alien to our system. Restitution, depriving a person of just compensation, is what courts of equity do all the time. To punish people is left to the law courts in accordance with the law as passed by the legislatures or as established by common law. It's never done by equity courts. It used to be they called a Star Chamber, but you don't do that sort of thing anymore.

The CHAIRMAN. But to be clear, in equity courts you have no right to trial by jury.

Professor JUNGER. That is important. You also have a right not to be punished. Equity courts are not there to punish people. They are to give equitable remedies. The major one is restitution; the other major one is injunctions.

Now, when the Economic Stabilization Act was first passed, all it contained in the way of penalties was a $5,000 penalty for willful violations. And, obviously, the original scheme—that was in section 204—was 205 which provided for injunctions, including mandatory injunctions. And if you look at the earlier cases under price control laws, clearly it did allow restitution even though the word wasn't in the statute. We're not talking just about the word.

And the entire scheme was injunctions. If somebody started to do something wrong, you told him to stop, and the court would tell them, and they would know what they were doing. If somebody had already succeeded in making some money in violation, then you have a mandatory injunction, a restitution order saying get the money back. That is perfectly proper in equity, but to go on and punish somebody—and that's the only thing you can call it when somebody has to pay back money that he never received—is totally inappropriate in an equity proceeding.

If the government were to bring these matters as penal proceedings, then the question of whether or not the central figure, who has not done anything negligent or willful, should be held liable would be a very, very relevant question.

The CHAIRMAN. Does this decision have any salience outside of the particular statute?

Professor JUNGER. I don't think it is going to destroy the law of restitution because all of us restitution teachers are just going to say, well, that's not restitution. That is government beating up on people.

But I think it could have a great deal of negative impact on the ability of enforcing regulatory schemes, particularly price control schemes. I'm afraid some day or other we will come back to that again.

The CHAIRMAN. Suppose, for example, the treasurer of a corporation files a tax return or files something and it turns out to be wrong. He did it in good faith relying on the rules. He thought he did it in good faith, but it turns out to be wrong and the corporation is subjected, let's say, to a penalty. Could he be individually liable for that?

Professor JUNGER. This is not in my area of expertise. There is, however, the kind of area in which the problem of a central figure theory should be raised. It should not be raised in restitution cases. In restitution cases, the question is—in equity cases, the question is—has somebody received the money and been unjustly enriched. Have they received the moneys paid in violation? The question is not were they wrongdoers.

To talk about the central figure theory only makes sense in the context of whether or not that treasurer is a wrongdoer when he made a mistake. Should he be penalized for the mistake? And I don't think he should be, but that has nothing to do with the law of restitution. That has to do with the law of penalties for making mistakes when you file tax returns.

Senator MCCLURE. Mr. Junger, how does the central figure theory in restitution compare to or contrast with the tortious conduct theory?

Professor JUNGER. Well, there are two problems with the phrase "tortious conduct." And this has nothing to do with restitution. One question about it is for these per se violations, which don't require negligence or willfulness or intent, whether they should be punished the same way a common law tort is.

The second question is should either theory be necessary in restitution or should they be a basis for requiring restitution of something that wasn't received. And my answer to that is in the context of restitution, the tort theory and the central figure theory is the same. In the context of where it should be properly be raised in a damage or penal proceeding, then that is the entire issue.

Senator MCCLURE. If I understand you correctly—and I want to be sure I do understand you correctly—you say tortious conduct is not really related to restitution cases.

Professor JUNGER. That's right. The tort may be a basis for the unjust enrichment. But the restitution case is to get back the unjust enrichment. It isn't to punish for the tort or to get damages for the tort.

Senator MCCLURE. Are we under this statute, in dealing with this class of cases, dealing clearly and exclusively with a restitution case?

Professor JUNGER. Under section 209, you are dealing either with injunctions or with restitution.

Senator MCCLURE. Are we arguing here a theory that really has no application to this particular class of cases?

Professor JUNGER. My position is that the central figure theory is just plain silly to talk about in the restitution context. Now, it could be relevant in the sense that——

Senator MCCLURE. But I think you misunderstand my question.

Professor JUNGER. Oh, I'm sorry, sir.

Senator MCCLURE. We have been talking a lot about restitution cases, but is this really a restitution case?

Professor JUNGER. If it is brought section 209, it has to be.

Senator MCCLURE. Why does it have to be?

Professor JUNGER. Because section 209 only allows restitution and injunctions as the remedies, and we're not talking about injunctions. Now, if it is brought under what no longer exists, 208, or if it is brought under EPAA for penalties, then we are talking about a case outside of my area of expertise where it is not brought for restitution But what I think has happened, the government has found it is easier to penalize people in a restitution action——

The CHAIRMAN. May I jump in here and point out something about section 209 which is the last sentence which says, "In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation"? Now, I think what the court is saying here is moneys received are moneys received by anyone when really what we meant was moneys received by such person—that is, the person guilty.

Professor JUNGER. And that is what the Supreme Court did in *Warner Holding* when they establish this idea of restitution in these sort of cases.

The CHAIRMAN. And that is what you are saying that the equitable restitution theory means. It doesn't mean received by anyone, but by the person who does the act.

Professor JUNGER. That is right.

The CHAIRMAN. Excuse me.

Senator MCCLURE. What I am really trying to get at, Professor, is under the existing statute that leads to these cases, is there any way the cases can be prosecuted under that section under any other theory than a restitution theory?

Professor JUNGER. No.

Senator MCCLURE. So, there is in your opinion no way in which the government can seek the relief they seek except as a restitution case under that particular statute.

Professor JUNGER. Under that particular section. They can seek penalties under the penalty provisions of EPAA that have replaced the penalty provisions of section 208.

Senator MCCLURE. Well, I wanted to make sure that we were not dealing with a theory that had no application to this particular kind of case. It's your opinion that we are arguing about precisely the right kind of theory.

Professor JUNGER. The central figure theory would raise a big problem if they tried to apply it in a penalty case. And I don't think they are going to sell it to a jury on the facts of the cases we have heard about today. And that is why I'm afraid they are bringing it in restitution cases where it doesn't belong.

Senator MCCLURE. In the *Citronelle TECA* decision, the court stated that the court would take into account the equities and facts in particular cases. Will the defendants in the pending cases be able to argue that their circumstances are different from those of Mr. Chamberlain in the *Citronelle* case?

Professor JUNGER. Yes, sir. And the government will be able to argue that their circumstances are worse.

What my position is and what I think—as somebody who has worried about this a lot as a law professor, I don't have any ax to grind. What my position is is that nobody should in a restitution proceeding without the right to a jury and without some law like the penalty provisions authorizing penalty. Nobody should be penalized by being ordered to return something they didn't receive.

Now, in many of these cases, people may have received something and the government could bring a proceeding to get it back. I'm not concerned with that. That's proper restitution. If the stockholder receives the benefit, the government can seek under restitution to get that benefit back.

Senator MCCLURE. Are the courts able to trace that benefit to shareholders?

Professor JUNGER. There are tracing difficulties. Tracing is a very difficult thing, and it is going to be very difficult for the government to prove. But there is no difficulty whatsoever in tracing the money into the hands of the corporation in these cases.

I'm afraid the only reason these are being brought is the corporations have gone broke. And as I understand it from what I heard today, they are not being brought against the chairman of the board of Exxon or the manager of the field when they had to make large restitution payments.

Senator MCCLURE. Professor, if a person acting on behalf of a corporation makes representation to a third party which induces that party to sell an item for less than its true value, may the agent be required to make restitution to the third party?

Professor JUNGER. Without any regard to the statutes, if it is a false representation, yes. If it is a mistaken representation, you've got a difficult problem on your hands.

Senator MCCLURE. I'm talking about the agent for the corporation and his personal liability.

Professor JUNGER. He can be personally liable for deceit, yes, a tort of deceit, and he might——

Senator MCCLURE. But that is tort. That is not restitution. Is that correct?

Professor JUNGER. That's damages.

Senator MCCLURE. That's damages, and that's not restitution.

Professor JUNGER. That's correct. The agent who did not receive the proceeds would be liable for damages. The corporation would be liable in restitution to return the proceeds. If the corporation can show that the agent was acting outside of the scope of his employment, the corporation would not be liable for damages.

Senator MCCLURE. So, just in the narrow sense of the restitution theory and using restitution in that very narrow sense, the agent that made the misrepresentation could not be required to make restitution.

Professor JUNGER. He could be required to pay damages. Now, I don't want to quibble about the word "restitution." I am using it in a technical sense.

Senator MCCLURE. I don't want to quibble about it either, but I want a very precise answer. The agent that made the misrepresen-

tation, but did not receive the value, could not be required to make restitution.

Professor JUNGER. That is correct. He could be required to pay to damages, and it will be probably in the same amount.

Senator MCCLURE. But that's a different action.

Professor JUNGER. Right.

Senator MCCLURE. Based on a different theory.

Professor JUNGER. And the statutes provide damages only in section 210 and not at the behest of the government.

Senator MCCLURE. Well, Professor, I'm having a little difficulty getting the answer as clearly as I want to get it because you keep giving me a different answer.

I asked if the agent could be required to make restitution, and your answer is he can be required to pay damages. What I'm trying to find out is whether or not he could be required to make restitution.

Professor JUNGER. The problem is, sir, is that the damages and the restitution are probably going to be equal and, therefore, when he pays the damages, it has the same effect in that case as if he made restitution. But no, he is paying damages; he is not making restitution.

Senator MCCLURE. And he cannot be made to pay restitution.

Professor JUNGER. That is correct.

Senator MCCLURE. If the statute calls for restitution, he could not be required to pay. If the statute provides for the collection of damages, he could.

Professor JUNGER. That is correct.

Senator MCCLURE. Is that correct?

Professor JUNGER. Right.

Senator MCCLURE. And if all the statute calls for is restitution, there would be no cause of action against him under that statute.

Professor JUNGER. Yes, sir.

Senator MCCLURE. Thank you.

You've mentioned that the *TECA* decision in *Sauder* was incorrect in holding the operator liable for the full amount of the overcharges he caused. Would you say the same thing about the *Exxon* decision?

Professor JUNGER. No. I have not looked closely at that, but that's an operator theory case and the operator of a field as I understand it, is held liable on an agency incorporated association theory and that the liability is the liability of the entire association. And the operator is liable for it because the operators are liable for the debts of the association.

If, on the other hand, the *Sauder* case and the *Exxon* case are based on the theory not of Exxon and Sauder being liable for the debts of the organization, but is based on the theory that they are liable to make restitution under section 209 on moneys that they didn't receive, yes, then I would say those cases are wrong too. But they are very, very different cases from *Citronelle,* and the motive for imposing liability upon the operator is very, very different. The court makes it very clear in *Sauder* that the liability is put on the operator because he can go after the other boys and it would put a tremendous administrative burden on the government to have to go and sue everyone.

In a case like *Citronelle,* the case I understand you are here today, the obvious person to sue is not the individual; it's the corporation.

The CHAIRMAN. Professor Junger, if I may jump in here, how would you fix this or how would you advise us to fix it? We don't want to take away to the ability of the Department to sue wrongdoers and to collect back ill-gotten gains and all of those things. But I think you think it is wrong legally, and I personally think it is just outrageous. "Outrageous" is a word we really overuse so much it loses it's meaning, but this really is outrageous as the Greeks meant it. So, how would we fix it?

Professor JUNGER. In one of my letters to you, I suggested a quick fix which was simply to add to the restitution statute "from the person who received it." Now, it seems to me it almost insulting to the courts to have to do that. I showed the language of 209 to a colleague of mine who teaches in the area of legislative drafting, and he really had difficulty in believing that a court could read that and say, oh, that means somebody who didn't receive it has to pay back the money that was received. But if that is what it takes.

I think you should be careful not to cut off the ability to trace the moneys, if the government can carry that burden. I think you should be—well, really what I think is you should just make it clear that nobody should be liable for restitution for something that they did not receive.

The CHAIRMAN. Well, by adding on those three words, you suggest received "by such person." I think those are the three words you suggest.

Professor JUNGER. Right. As I say, that was a quick and dirty fix. I can't think of a better one offhand.

The CHAIRMAN. To put in those words would not take away the traditional ability to follow the real benefits either through stock appreciation or salary or——

Professor JUNGER. You might want to substitute the word "benefit 'for "moneys 'to restitution of the benefits received, or the profits received, or the moneys received and their proceeds I think would be the language that the Restatement of Restitution uses.

The CHAIRMAN. The Restatement of Restitution is what?

Professor JUNGER. They use the proceeds in tracing cases all the time. The proceeds of the money so that the government could get restitution of the money or its proceeds from the person who received the money, something like that.

The CHAIRMAN. Well, I think there is some sentiment—at least I have the sentiment, and I think some of my other colleagues do—that we would like to try to fix this. I wonder if you would after today——

Professor JUNGER. I'd be happy to take a try at it, but I don't think I should try legislative drafting from the hot seat.

The CHAIRMAN. Yes, that's what I'll say. If you'll think about it and——

Professor JUNGER. I'll be very happy to submit my ideas on that subject.

The CHAIRMAN. That would be very, very helpful to us. And maybe whatever explanation you want to put in there we would put that as part of the record and adopt it as our own thoughts.

Professor JUNGER. By the way, sir, I do share some of your indignation, but I'm not an expert in indignation. And I thought I was here to testify——

The CHAIRMAN. Well, we're professional indignators up here. [Laughter.]

Senator MCCLURE. Professor, you have indicated you have some trouble with the application of the central figure theory to restitution cases. Did I understand that correctly?

Professor JUNGER. I consider it very dangerous both from an enforcement point of view and from the—more from the enforcement point of view. You don't have to show anything except the violation and the receipt of the unjust enrichment for the government to be entitled to restitution. They don't have to show that the person who received the moneys did anything wrong. Now, in equity, if he has some equitable defenses, he may not be compelled to pay it back. The poor widow who receives the money and spent it all and can't pay it back is not going to be held by an equity court to have to make restitution.

But if somebody received the money—say, the wrongdoer sets it up so that the wrongdoer sets up so that the wrongdoer's wife, who is as innocent as can be, gets the money, restitution still should be available, it seems to me, against her. And I think it is necessary is you're going to be able to enforce the regulatory scheme effectively. But she is not being punished for being a wrongdoer. You're just getting the ill-gotten gains.

Senator MCCLURE. But punishment for being a wrongdoer is different than the theory of restitution.

Professor JUNGER. They are 180 degrees apart.

Senator MCCLURE. And I'm trying to keep them separate.

Professor JUNGER. Yes.

Senator MCCLURE. As I understand, what you are discussing here today is the theory of restitution because you view the statute as being a restitution statute.

Professor JUNGER. And the history of the statute. As I said, originally in 1970 it did not provide for a restitution. It just provided for injunctions.

Senator MCCLURE. Do you draw any distinction between the common law theory of restitution in equity cases and statutory restitution required by specific statutes?

Professor JUNGER. In this case, no, because restitution was already available under the Federal common law of restitution in price control cases which was established in *Warner*. A Texas case in district court—the case is named *Lieb*—held that restitution was available before the word "restitution" was put in the statute. The legislative history shows that the word "restitution"—that last line—was added to the statute simply to make clear that the courts have the power that they already had under the Federal common law. In the original, Second World War Price Stabilization Act, there was no reference to restitution. *Warner Holding* said that restitution was the central remedy in equity and that was available

to the government. So, in this case the statutory reference is a statutory reference to the common law of restitution.

The CHAIRMAN. Professor, I'm going to jump in here, if I may. You heard me read with the earlier panel the findings of the district court in the *Citronelle* case with reference to good faith, the fact that there was no intention. You heard that. And you also heard the previous panel make some statement to the effect that the second TECA panel took a different view.

Don't I understand correctly that the facts, as found by the district court with respect to the lack of what we used to call scienter or a guilty mind and good faith, all of those things, were assumed throughout the litigation, weren't they? Or not contradicted should I say?

Professor JUNGER. Now you are asking me about the particular case. This is outside my expertise, but I've read it rather carefully. And I think I'm a fairly good lawyer. My understanding of it is the first court found no willfulness in that passage that you read—the trial court. The second case and then the first case in TECA went along with it and said we do not challenge—we think the acts were made in good faith I think was the phrase in the second TECA case.

It went back down to the trial court on remand, and the trial court said we're not getting into that matter. It's the law of the case. Chamberlain is not liable for any more than the amount he received.

Then it went up to TECA II and without overturning the decision on some basis or other, and since they weren't the trial court, I can't quite see how it's a factual basis. They pooh-poohed the trial court's determination and said, well, that wasn't in the context. And then without making a new determination, they said he is liable for the full thing. I don't know how it works.

The CHAIRMAN. What I'm getting at is I was trying with the earlier panel to find out what it takes to invoke this theory.

Professor JUNGER. Well, as I read the holding, all it takes is a showing that somebody was somehow instrumental—and I can see the logic extending to the temporary secretary who typed the papers—in causing this violation to take place. And if they were instrumental in causing the violation to take place, even though they were not negligent, they weren't willful or anything like that, they can be held liable for all the moneys that somebody else received.

Senator MCCLURE. But that's not a restitution theory.

Professor JUNGER. That is the theory the government is calling restitution. That is the exact opposite of restitution as far as I believe.

Senator MCCLURE. Well, the reason I ask that is because you used the term "can be held liable, 'which I understand to be—

Professor JUNGER. That's the holding in *Citronelle.*

Senator MCCLURE [continuing]. A tortious term, not a restitution term.

Professor JUNGER. One speaks of liability for damages. One speaks of liability for restitution.

Senator MCCLURE. All right. In which context were you using that term?

Professor JUNGER. I was describing the holding of *Citronelle-Mobile* and holding that the court held there was liability on these facts. And they called it restitution because it was under 209. It had to be restitution liability that they were calling it. That's a mistake. That kind of liability can't be restitution.

The CHAIRMAN. But on the narrow point, and without reference to the facts, the decision in *Citronelle* does not require negligence or bad faith or anything other than being a central figure.

Professor JUNGER. That's right.

The CHAIRMAN. And once you're a central figure, it is virtually liability per se.

Professor JUNGER. As I read it, a liability per se theory. The liability is per se liability. There is no showing that the corporation did anything wrong or willful or negligent either.

The CHAIRMAN. We had quite a discussion there you heard with the earlier panel about what it takes, and we were given something like conscious conduct, conceptualize, skirting the statute, taking advantage of the regulations, conceived, planned, acted. None of those are requirements, whatever those words as used by the previous panel mean. There is no requirement in *Citronelle* that you skirt a statute or whatever, is there?

Professor JUNGER. None that I can see. But I do want to point out that to the extent the benefits were received, I think the decision is correct. The original district court decision is correct. You don't have to show those things to get real restitution, but you do have to show those things, I hope, to get penalties or to get damages. But the government has avoided the necessity of showing whatever has to be shown to get penalties by bringing what they call restitution cases, but getting relief that can only be described as penalties.

The CHAIRMAN. One more question. Can you surmise why the court, particularly the Supreme Court, made what seems a basic mistake?

Professor JUNGER. The Supreme Court?

The CHAIRMAN. Well, the Supreme Court refused certiorari.

Professor JUNGER. They didn't review it. I don't think you are ever going to get the Supreme Court to review these cases unless *TECA* splits itself in half and disagrees with itself. The usual reason the Court takes cases is disagreement in the circuits. And the way the Court has jurisdiction, you are not going to get that.

The CHAIRMAN. Can you explain why *TECA* might have——

Professor JUNGER. Well, I have a rather long-winded explanation here. Basically, I think it just sort of happened. We heard today that possibly part of the problem was and the reason Chamberlain was punished was he had the temerity to sue the government. And that is what made his case a bit different. I get the feeling that he might have been a rather irritating sort of individual.

When you got to the second *TECA* hearing where the mistake occurs, for some reason—you know, I'm an academic, and I don't want to second-guess lawyers who are in the firing place. I used to be there many years ago. But for some reason the argument that was made was that their first decision was wrong and they didn't spend any time on this point. And the only point that was made that was relevant to the individual liability was to say the central

figure theory can only apply to torts. It did not make the point that—and what they were saying when they were talking about torts, all the cases they were citing were damage cases. And they weren't talking about restitution cases.

And here it sounds like I'm very bright but, after all, I look at the case years and years later. I had lots and lots of time to think about it. Looking at it in retrospect, to me as a specialist, it seems very, very clear that what should have been argued is, look, you're bringing restitution. If he received the money, he is liable. You don't have to show he's a central figure. And if he didn't receive the money, then he isn't liable even though he was willful, malicious and everything else under the sun. He isn't liable for restitution. Go get him criminally.

Senator MCCLURE. I have a couple of other questions, Professor. This is way out of my field, so I ask a question seeking information. So, educate me. I'm your first year law student.

Professor JUNGER. I try to confuse them, Senator. [Laughter.]

Senator MCCLURE. Well, and you may succeed, and you won't find me much more difficult in that regard.

My recollection is that the Federal law does not embrace English common law.

Professor JUNGER. The Constitution gives the Federal courts jurisdiction over cases at law and equity. It is very much a common law concept. The right to jury trial is at common law, but not in equity. When the Constitution was adopted, it was on the basis of the common law. Since then, over the years common law has developed in the Federal courts, particularly in things relating to the Federal Government. There is a Federal common law of government contracts which Professor Jacoby, who I learned a lot from, used to say was more government than contract. As I say, what we are getting here is more government than restitution. But there is a Federal common law which you can trace all the way back into the English common law, yes.

Senator MCCLURE. It is? So, you have no difficulty in tracing to statutory penalties or reliefs the common law theories that were in practice before the statutes were enacted.

Professor JUNGER. Well, as I say, in this case the common law theory of restitution was first applied to a price control regulation and enforcement in *Warner Holding* by the Supreme Court. And it's a common law decision because it wasn't statutory; it was the Supreme Court applying traditional equity doctrines to that particular case. Then the Congress just picked it up in the statute, and said, yes, the Supreme Court was right.

Senator MCCLURE. So, you would say that if, indeed, there were an unjust enrichment of some entity to the expense of the Federal Government or at the expense of the Federal Government, the Federal Government has a common law equity relief to recover that unjust enrichment.

Professor JUNGER. Exactly, sir.

Senator MCCLURE. And if that is the case, it is also true, is it not, that the courts presume that the Congress didn't intend to do a useless thing. Now, let's not get into the theory about whether Congress is useless——

[Laughter.]

But as to whether or not there is that other theory that Congress intended to do something when they enact statutes.

Professor JUNGER. Well, I don't have the language of section—the legislative history of 209 right with me. I think I may have part of it in my statement. But the language was. They just wanted to make it clear.

Senator MCCLURE. But you are jumping over the question that I asked to a question I have not yet asked. It is correct, is it not, that presumption by the courts is that Congress did not intend to do a useless thing.

Professor JUNGER. Yes.

Senator MCCLURE. And that if there is a common law right to relief or recovery of restitution, then Congress must have intended to do something different or in addition to that, unless it is very clear from the legislative history or the statute itself, that all it was doing was reaffirming the common law right.

Professor JUNGER. The history was you had the first price control. Then you had *Warner Holding.* Then you had a case called *Lieb* in the Texas District Court, and then Congress enacted the act in 1970 without the restitution provision. And then in 1971 they amended the act to add the restitution provision, and in the legislative history, they said they were doing that to make it clear that the courts did have this right. The language is——

The CHAIRMAN. Let me interject, if I may, because this is very much on the point.

The conference report on the section, which has become title XV, section 754, states: "Nothing in this section is intended to change existing case law relating to the individual responsibility of corporate directors, officers or agents for violations of those corporations."

Senator MCCLURE. That is useful, but a little different than the question that I was asking.

I really did want a direct answer whether or not it is a matter of law that it is assumed that Congress meant to do something when the Congress passes a statute.

Professor JUNGER. But I think often it is assumed that the Congress wants to affirm that the courts were right in what they were doing.

Senator MCCLURE. That wasn't the question I asked, Professor. You know, you're flunking my course. [Laughter.]

I suspect you flunk students who didn't answer the question you asked.

The question is: Is it a presumption that the Congress intended to do something when they pass a statute, and when you try to determine what it is they intended to do, do you look at legislative history.

Professor JUNGER. Yes.

Senator MCCLURE. So that, indeed, if Congress passes a statute and all they intended to do was to reinforce the right of restitution that was already existent as a matter of common law, you would expect to find in the legislative history a clear statement that that is what Congress wanted to do.

Professor JUNGER. I think you would, yes. I think you will in this case.

Senator McCLURE. And if you didn't find that statement in the history of the statute, then you would presume that Congress intended to do something by the passage of the statute that wasn't accomplished by the common law.

Professor JUNGER. Well, they did more than just add the restitution provision when they passed the statute in 1971.

Senator McCLURE. I understand that, but am I right in tracing the way in which the court would look at the statute?

Professor JUNGER. In the absence of legislative history—I'm used to states where they don't have any, and I'm not sure that the courts would say, well, the absence of legislative history was determinative.

Senator McCLURE. All right, but they will try to decide whether or not the Congress intended to change or reaffirm the underlying common law that would be in effect absent the statute.

Professor JUNGER. That's correct.

Senator McCLURE. And in doing that, they look at the way the words are used and the legislative history and the committee reports.

Professor JUNGER. That's correct.

Senator McCLURE. So, if there is on the basis of that history a clear reference to the fact that the Congress was simply enacting in statute what was common law, you would find that in the history. And you would expect then the court would apply it.

Professor JUNGER. Yes.

Senator McCLURE. Unless, of course, the court didn't want to, and then they will find some reason to do otherwise.

Professor JUNGER. Yes. Of course, in this case, the court did not admit they were deviating in the slightest.

Senator McCLURE. I only say that because I am a little perplexed to know how the court did what they did—more than a little perplexed—in determining that, indeed, there was a central figure theory that could be applied to restitution. You say it shouldn't be applied to restitution. It's all right to be applied over in tortious conduct or in damages or liability. That's a different section of the statute as you read it and as I read it. Am I correct?

Professor JUNGER. That is correct.

Senator McCLURE. So that the court was confusing the equitable remedy of restitution as affirmed by the statute and the damages theory that may apply under a different section and under a different theory.

Professor JUNGER. That is correct.

Senator McCLURE. I wanted to make sure that I understood clearly what it was you were trying to tell us today and where you believe the court made an error in the *Citronelle* case. And you do believe the court made an error there.

Professor JUNGER. A whopping one.

Senator McCLURE. Thank you very much.

The CHAIRMAN. Professor Junger, you have passed my course with an A, maybe not Senator McClure's.

Senator McCLURE. He may have gotten there at the end. [Laughter.]

The CHAIRMAN. I see in your background that you graduated magnum cum laude from Harvard Law School. I must say that is almost as impressive as a regular degree from LSU. [Laughter.]

Professor JUNGER. Very nearly, Mr. Chairman.

The CHAIRMAN. But we do appreciate very much your testimony, Professor Junger. To your students, I think you would be an excellent teacher of the law.

Professor JUNGER. Well, you must realize I am not used to answering the questions. [Laughter.]

The CHAIRMAN. Thank you very much, Professor Junger.

Senator MCCLURE. Thank you.

The CHAIRMAN. Our next witness is the inimitable Donald Guillory who is, indeed, from Lake Charles, Louisiana, and also Mr. Malcom Turner from Dallas, Texas. Let the record reflect that I don't know either of these gentlemen I don't think.

Mr. GUILLORY. Good morning. I'm Donald Guillory from Lake Charles.

The CHAIRMAN. If we have met some time in the distant past, that doesn't mean I wasn't impressed with having met you. [Laughter.]

Mr. GUILLORY. No, sir. We've never met.

The CHAIRMAN. Please proceed.

STATEMENT OF DONALD W. GUILLORY, LAKE CHARLES, LA

Mr. GUILLORY. Mr. Chairman and members of the committee, my name is Donald W. Guillory. And I appreciate the opportunity to appear here this morning to testify about what I've been going through as a result of the Department of Energy's enforcement actions against me.

In April 1987, the Department of Energy filed a court action against Scruggs Energy Company in which I am named as a defendant. In its complaint, DOE states that I am personally liable for more than $26 million in overcharges and interest, joint and severally with Scruggs Energy Company and W.W. Bill Scruggs.

The DOE's claim against me is so terribly unfair that I cannot believe the government would allow such a thing to happen. This thing has been really hard on me, and I don't if I can read it all. Okay?

[The prepared statement of Mr. Guillory follows:]

Statement of Donald W. Guillory

Mr. Chairman and members of the Committee: My name is Donald W. Guillory. I appreciate the opportunity to appear before you this morning and to testify about the terrible ordeal I have been going through because of the Department of Energy's enforcement actions against me.

In April, 1987, the Department of Energy filed a court action against Scrugge Energy Co., in which I am named as a defendant. In its Complaint, DOE states that I am personally liable for more than $26 million in overcharges and interest, jointly and severally with Scrugge Energy Co. and W.W. (Bill) Scruggs.

The DOE's claim against me is so terribly unfair that I cannot believe that the government would allow such a thing to happen. I have never intentionally violated any regulation, and the money I received from my employment by Scrugge Energy Co. amounts to only a very small fraction of DOE's claim against me. In addition, I never had any ownership interest in Scrugge Energy. Yet, because that company and its principal shareholder, Mr. Scruggs, are now reportedly without resources, the burden of the alleged regulatory violations would apparently fall almost entirely on me. If the DOE is successful in this case, its judgment will greatly exceed my total personal assets, and I and my family will be financially ruined. I simply cannot understand how the government can act in this way.

I have been in the oil business all my life, having started as a laborer for Shell Oil Company in 1971. I worked my way up to become a supply analyst, responsible for approximately 470,000 barrels of crude oil a day in the Shell System, which was traded to enable refineries at Wood River, Illinois and Narco, Louisiana to receive their crude oil supplies. In June 1976, when it looked like the government was going to break up the major oil companies through divestiture, I decided to go to work for a smaller company. I worked first with P&O Falco, where I was responsible for crude oil trading, and then, beginning in March 1980, for Scruggs Energy Co.

As a crude oil trader, I negotiated precisely the same kinds of transactions during price controls as I had previously. In these transactions, the crude oil subject to the trades was not physically transported. Nevertheless, according to DOE's Complaint, because the crude oil involved in certain transactions of Scruggs Energy Co. was not transported as part of those transactions, DOE concludes that no service was provided and that no profit could be earned. DOE's position in this regard flies in the face of well-established industry practice which, both before and after the price regulations, recognizes the value of crude oil trading.

DOE's retroactive interpretation of its regulations in this manner would be bad enough if its enforcement efforts were

limited to the company that received the profits on these transactions. What makes the situation so terrible, however, is the government's claim that, as an employee, I should be liable to "repay" vast amounts of money I never received. My compensation as an employee of Scruggs Energy Co. was comparable to that which I had received from my previous employer, P&O Falco. I conducted all business in my corporate capacity, and sought to comply with all DOE rules and regulations. All regulations regarding the conduct of corporate affairs were complied with and all corporate and DOE books, records and reports required by DOE were kept. In fact, I have been told that one reason Scruggs Energy was selected by DOE for a court action instead of the usual administrative action was because its books and records were so well-kept.

The Complaint against me does not contain any allegations of any willful misconduct on my part, or even that I was negligent. It does not claim that I received the benefits of any of the transactions DOE claims were illegal. In fact, the only references to me are in paragraph 6 (where I am identified as a resident of Lake Charles, Louisiana, and as a former director and officer of Scruggs Energy Co., in which capacity I engaged in the business of purchasing and reselling crude oil); in paragraph 30 (which states the date I became an officer and director of Scruggs Energy Co.); in paragraph 31 (which states that I

conducted crude oil resales for the company); and in paragraphs 42 and 43 (which state that I am personally liable for more than $26 million).

The government's action against me is punitive in every sense.

The DOE waited more than six years after the transactions in question took place. Then it filed an action against me in which its only burden is to persuade the court that transactions in which I participated, as a corporate officer, violated DOE's interpretation of the regulations. DOE does not have to show that I intended to violate the regulations or that I acted in bad faith. DOE does not even have to show that I was negligent. DOE also does not need to show that I received any of the profits that resulted from these now-claimed to be illegal transactions, or that the corporate form of doing business was abused in any way whatsoever.

All the DOE needs to show is that its interpretation of the regulation is different than mine. Once it does that, it can claim from me not only the entire amount of its calculated corporate overcharges, but interest compounded at the prime rate during the many years it was fully aware of the transactions and did nothing about them. The size of DOE's claim against me far exceeds the amount of civil penalties that could be imposed upon me if I had engaged in willful misconduct.

The size of DOE's claim against me also far exceeds any amount I could conceivably pay, and it would obviously wipe out all the assets I have been able to acquire in a lifetime of work. These assets, limited though they are, were acquired primarily through employment entirely unrelated to my employment by Scruggs Energy Company.

The DOE should also be aware that the mere filing of its enormous claim against m as taken a terrible toll on my personal and financial well-being. Because of the charges against me, I am unable to obtain employment or engage in business activities. The lack of income and imminent threat of financial ruin has taken a very heavy toll on my personal and family life, as well. I am now under a doctor's care for depression, and, quite frankly, I do not see any prospect that I will ever be able to recover from the situation in which I find myself.

I am advised by my lawyers that under traditional principles of law, DOE's complaint would not state a claim against me because corporate officers and directors are generally not responsible for corporate liabilities, including those arising from non-intentional corporate regulatory violations. Nevertheless, the recent court decision which adopted the "central figure" theory of liability apparently gives the government a basis on which to claim a judgment against me for millions of dollars that I never received. This is not right, and as an American

citizen I urgently request that you do everything in your power to prevent this central figure theory from being applied in my case or in other cases like mine.

If you have any questions, I would be glad to try to answer them. Thank you again for giving me this opportunity to speak.

AO 440 (Rev. 8/85) Summons in a Civil Action

United States District Court

SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

UNITED STATES OF AMERICA,

Plaintiff

SUMMONS IN A CIVIL ACTION

CASE NUMBER:

H-87-1315

VS.

SCRUGGS ENERGY CO.,
W.W. (Bill) SCRUGGS
and DONALD W. GUILLORY,

Defendants.

TO: (Name and Address of Defendant)

Donald W. Guillory
Rt. 8, Box 194
Lake Charles, LA 70605

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)

FLOYD I. ROBINSON, ATTORNEY
U.S. Department of Energy
1000 Independence Ave., S.W.
Washington, D.C. 20585
(202) 586-5401

an answer to the complaint which is herewith served upon you, within (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

APR 24 1987

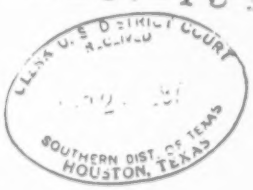
Jesse E. Clark, Clerk
CLERK

DATE

J. Hoya
BY DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE UNITED STATES OF AMERICA, Plaintiff,	
v.	CIVIL ACTION 87-1015
SCRUGGS ENERGY COMPANY, W.W. (BILL) SCRUGGS, and DONALD W. GUILLORY, Defendants.	



COMPLAINT

1. This action involves the unlawful activities of defendants in buying and selling crude oil during the period August 1979 through January 1981, inclusive. During this eighteen-month period, defendants sold 12,416,124 barrels of crude oil in violation of the Department of Energy's ("DOE's") "layering rule", 10 C.F.R. § 212.186, which prohibited a reseller of crude oil from charging a price in any resale that exceeded its purchase price of the crude oil if, in the resale, it performed no service or other function traditionally and historically associated with the reselling of crude oil.

2. The United States seeks a judgment for restitution in the amount of $13,302,314.00, plus interest, which is the amount by which the prices charged by defendants in their unlawful sales of crude oil exceeded defendants' lawful prices. See Appendix A. The interest on this amount through March 31, 1987, is $16,969,504.00. See Appendix B. The United States, therefore,

seeks a total judgment in the amount of $30,271,818.00, plus interest thereon after March 31, 1987.

PARTIES

3. The plaintiff is the United States of America, suing on behalf of the United States Department of Energy ("DOE"). The DOE is an executive department of the United States, established by the Department of Energy Organization Act ("DOE Act"), 42 U.S.C. § 7101, and authorized by Congress and the President to administer and enforce programs concerning petroleum allocation and pricing. On October 1, 1977, pursuant to Executive Order 12009, 42 Fed. Reg. 46267 (September 15, 1977), the DOE succeeded to the functions of the Federal Energy Administration ("FEA"). The FEA previously had succeeded to the functions of the Federal Energy Office ("FEO"), the agency in which regulatory authority was originally delegated pursuant to the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. §§ 751 et seq. The FEO had also been delegated the price control functions relating to the petroleum industry, which previously were performed by the Cost of Living Council ("CLC") under the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 note. In accordance with the transfer of functions to the DOE pursuant to the DOE Act, the DOE, as an agency and instrumentality of the United States, has the responsibility for administering and enforcing the provisions of the ESA, the EPAA, and regulations adopted pursuant thereto. Plaintiff, the United States, through DOE, therefore is responsible for the enforcement of the ESA, the EPAA, and their implementing regulations. For

purposes of this complaint, the DOE and its predecessor agencies will be referred to collectively as "DOE".

4. Defendant, Scruggs Energy Company ("SECO"), is or was a Texas corporation with its principal place of business in Houston Texas. During the period beginning in August 1979 and continuing through January 1981, SECO was engaged in the business of buying and selling crude oil.

5. Defendant W.W. (Bill) Scruggs ("Scruggs"), sued herein in his individual capacity, is a resident of Humble, Texas. He is or was the sole shareholder, the President, and a Director of SECO, and substantially dominates or dominated and controls or controlled SECO. During the period beginning August 1979 and through January 1981, he engaged in the business of purchasing and reselling crude oil.

6. Defendant, Donald W. Guillory ("Guillory"), sued in his individual capacity, is a resident of Lake Charles, Louisiana. From May 6, 1980, through January 1981, Donald Guillory was the other director of SECO, as well as Vice President, Secretary, and Treasurer. During that period he engaged in the business of purchasing and reselling crude oil.

JURISDICTION AND VENUE

7. Jurisdiction of this Court exists under section 209 of the ESA, 12 U.S.C. § 1904 note, as incorporated in section 5(a)(1) of the EPAA, 15 U.S.C. § 754(a)(1); and 28 U.S.C. § 1345.

8. Venue in this Court exists under 28 U.S.C. § 1391(b) and (c).

STATUTORY AND REGULATORY BACKGROUND

9. The price regulations applicable to the sale of crude oil originally were promulgated by the CLC on August 19, 1973, under the ESA. 38 Fed. Reg. 22,536 (August 22, 1973). These price regulations subsequently were promulgated also under the EPAA, 15 U.S.C. §§ 751 et seq., which became law on November 27, 1973. 39 Fed. Reg. 1924 (January 15, 1974).

10. The price controls applicable to this case remained in effect until January 28, 1981, when the President by Executive Order lifted them. Executive Order No. 12287, 46 Fed. Reg. 9909, January 30, 1981. Section 18 of the EPAA, 15 U.S.C. § 760(g), contains a saving clause providing that the termination of price controls shall not affect any administrative, civil, or criminal proceeding or action, whether or not pending upon the expiration of controls, based on any act committed or liability incurred prior to the expiration date.

A. The Tier System of Price Controls for Crude Oil

11. By the beginning of 1973, the President and the Congress recognized that rapidly rising world oil prices were a special inflationary problem in the United States. It was the primary purpose of the ESA, and the price controls put into place pursuant thereto, to limit this rise in prices and thus to reduce the rate of inflation.

12. In order to halt the inflationary spiral in crude oil prices while trying to limit the extent to which price controls would cause disincentives to possible future increases in domestic crude oil production, the CLC issued its Phase IV system

of controls on August 17, 1973. 6 C.F.R. Part 150, Subpart L, 38 Fed. Reg. 22,536 (August 22, 1973). The Phase IV controls were structured as a two-tier pricing system for first sales of domestic crude oil that consisted of price-controlled ("old") oil and free-market ("new") oil. 6 C.F.R. § 150.354.

13. On December 22, 1975, Congress amended the EPAA by enacting the Energy Policy and Conservation Act ("EPCA"), Pub. L. No. 94-163, 89 Stat. 871, as a result of which the FEA, effective February 1, 1976, amended the regulations to create a three-tier pricing system for first sales of crude oil. 10 C.F.R. §§ 212.72-76, 41 Fed. Reg. 4931 (Feb. 3, 1976). The three-tier system consisted of two different levels of price-controlled oil -- "lower tier" (or "old") oil and "upper tier" (or "new") oil -- as well as market-priced oil. Id. Generally speaking, production from a property up to its production level during a prior base period could be sold only as lower tier oil -- i.e., at the lower of the two controlled ceiling prices. Production in excess of this level was "upper tier" or "new" oil and could be sold at a price that, while still controlled, was substantially above the ceiling price for "old" oil. 10 C.F.R. § 212.74. The third and highest-priced tier of crude oil consisted of foreign crude oil and, after September 1, 1976, stripper oil, both of which could be sold at free market prices. Stripper oil was oil produced from a property with an average daily production of not more than 10 barrels per well per day during a previous qualifying period. 10 C.F.R. § 212.54(c), 41 Fed. Reg. 48319 (Nov. 3, 1976).

14. Various other categories of crude oil also were decontrolled during the course of the program. E.g., 10 C.F.R. § 212.79, 44 Fed. Reg. 25828 (1979)(newly discovered).

15. From the inception of the tier price control system for crude oil, each producer of crude oil was required to certify in writing to the purchaser the volumes of lower tier (or old) and upper tier (or new) crude oil being sold. 6 C.F.R. § 150.354(c); 10 C.F.R. § 212.74 (1976). Beginning August 29, 1974, each producer and each reseller of crude oil was required to certify in writing to the purchaser each of the regulatory categories or tiers of the crude oil being sold. 10 C.F.R. § 212.131. Thus, once a crude oil producer determined and certified the regulatory category (e.g., "old oil," "new oil," or "stripper oil") of crude oil produced and sold from a property, the certification provided by successive resellers for that crude oil had to continue to reflect the same regulatory category assigned by the producer.

B. Price Regulations Applicable to Crude Oil Resellers

16. DOE regulations defined "reseller" as a "firm (other than a refiner or retailer) or that part of such a firm which carries on the trade or business of purchasing covered products, and reselling them without substantially changing their form to purchasers other than ultimate consumers." 10 C.F.R. § 212.31, 39 Fed. Reg. 1924 (January 15, 1974).

17. DOE regulations defined "covered products" specifically to include "crude oil," as well as other petroleum and petroleum related products. 10 C.F.R. § 212.31, 39 Fed. Reg. 1924 (January 15, 1974).

18. DOE regulations explicitly provided that all regulated entities, including resellers, were prohibited from engaging in any practice that circumvented or contravened or resulted in the circumvention or contravention of the regulations. 10 C.F.R. § 205.202, 39 Fed. Reg. 32262 (September 5, 1974).

19. All regulated entities including resellers were prohibited from employing any practice which constituted a means to obtain a price higher than permitted by the regulations:

> [A]ny practice which constitutes a means to obtain a price higher than is permitted by the regulations in this chapter or to impose terms or conditions not customarily imposed upon the sale of an allocated product is a violation of these regulations. Such practices include, but are not limited to devices making use of inducements, commissions, kickbacks, retroactive increases, transportation arrangements, premiums, discounts, special privileges, tie-in agreements, trade understandings, falsification of records, substitution of inferior commodities or failure to provide the same services and equipment previously sold.

10 C.F.R. § 210.62(c), 39 Fed. Reg. 6530 (January 20, 1974).

20. From January 1, 1978, until decontrol, crude oil resellers were subject to the provisions of 10 C.F.R. Part 212, Subpart L. Under those regulations, a crude oil reseller generally could charge any price in a sale of crude oil as long as its monthly average markup did not exceed its "permissible average markup" ("PAM"). 10 C.F.R. §§ 212.182 and 212.183, 42 Fed. Reg. 64,856 (December 29, 1977), 45 Fed. Reg. 52,112 (August 5, 1980), 45 Fed. Reg. 74,432 (November 7, 1980).

21. However, a crude oil reseller also was prohibited from charging any price in excess of its actual purchase price in any

resale in which it performed "no service or other function traditionally and historically associated with the resale of crude oil". 10 C.F.R. § 212.186, 42 Fed. Reg. 64,856 (December 29, 1977).

22. This additional rule was designed to discourage or prevent what was known in the industry as "layering" -- i.e., the insertion of unnecessary intermediaries in the chain of purchase and sale between the producer and the refinery solely for the purpose of charging an additional markup without performing any traditional reseller services in connection therewith. During the period of controls, the number of resellers mushroomed from fewer than 50 to over 400. See Report of Subcomm. on Oversight and Investigations of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess., The Case of the Billion Dollar Stripper, (Comm. Print 1980) at 5. Most of these new entrants performed no traditional reseller services, such as gathering, transportation, or storage, but instead engaged in purely paper transactions and generally resold to each other. At some point in the paper chain, one of the resellers unlawfully would misercify lower or upper tier (price-controlled) crude oil as price-exempt crude oil in order to permit even further unlawful markups and resales back to the same resellers in the chain at progressively higher prices. See United States v. Sutton, 795 F.2d 1040, 1058-59 (TECA 1986). Such "tier laundering," coupled with the practice of multiple paper sales and resales of title to crude oil by resellers -- "daisy chain" transactions -- were the

devices by which the price of millions of barrels of miscertified price-controlled crude oil was unlawfully increased.

23. The DOE's Office of Hearings and Appeal officially has ruled that the phrase in § 212.186, "service or other function traditionally and historically associated with the resale of crude oil" (hereinafter abbreviated to "traditional reseller services"), means the performance of a significant, tangible, economic function, such as gathering, transportation, or storage of crude oil, which facilitated the movement of crude oil from the producer to the refinery and therefore was of economic benefit to the industry. P&R Trading Co., 13 DOE ¶ 82,023 at 86,167 (1985); AD Energy, Inc., 13 DOE ¶ 83,031 at 86,276 (1985); PetroTech Trading Co., 13 DOE ¶ 83,023 at 86,294 (1985); Erickson Refining Corp., 13 DOE ¶ 83,045 at 86,365 (1985); Liberty Trading Co., 13 DOE ¶83,048 at 86,402 (1985); Fuel Oil Supply and Terminaling, Inc., 13 DOE ¶ 83,054 at 86,438 (1985).

24. Virtually all of the administrative enforcement actions taken by DOE under § 212.186 have involved in-line or in-place transfers of crude oil. An "in-place" transfer generally means the resale -- often the repeated resale -- of title to crude oil that physically remains stationary -- that is, remains in or designated for shipment in a particular pipeline, storage tank, ship, or similar vessel or facility. These transactions do not involve the taking of physical possession of the crude oil by the reseller or reseller ownership or control of the pipeline, tank, vessel or facility concerned. An "in-line" transfer refers to pipeline transactions of this sort, i.e., transfers of the title

to crude oil scheduled for delivery to a crude oil pipeline. "An in-line transfer is a purchase/sale transaction in which a party obtains title to crude oil which is to be delivered in the future to a specific pipeline system and transfers title to that crude oil to another party." Osborne Energy Corp., 14 DOE ¶ 83,013 at 86,081 (1986).

25. In the type of in-line transfer with which DOE's enforcement effort is primarily concerned, and the type of in-line transfer at issue in the present action, the in-line transferor is an "intermediate" crude oil reseller, one who appears in the middle of a chain of transfers of title between other crude oil resellers (or refiners acting as resellers). A reseller of this type does not purchase from a producer nor sell to a refiner; it deals only with other resellers. With each such paper sale of the crude oil in these in-line transfers, the reseller adds an additional markup without ever taking physical possession of the crude oil and without performing any useful service such as gathering, transportation, or storage.

26. DOE has determined that the kind of in-line transfers just described -- the kind of in-line transfers at issue in this action -- were "exactly the type of transactions that the layering regulation sought to prohibit." E.g., Robison Energy, Inc., 14 DOE ¶ 83,028 at 86,236 (1986). DOE also has determined that this activity was in violation of the anti-circumvention provisions of §§ 205.202 and 210.62(c). Id. at 86,237.

FACTS

27. From August 1979 through January 1981, SECO purchased and instananeously resold title to 12,416,124 barrels of crude oil in 193 transactions, all in-line transfers, without ever taking delivery or physical possession thereof. With regard to these transactions, defendants did not gather, handle, transport, or store crude oil or, indeed, even have any gathering, handling, transportation, or storage facilities or capabilities.

28. SECO received revenues of $13,302,314.00 in excess of the acquisition cost of the crude oil in these 193 transactions. A list of these 193 transactions, together with the purchase, sale, and other data pertaining thereto, is attached hereto as Appendix A.

29. From August 1979, when SECO first began reselling crude oil, until May 1980, defendant Scruggs conducted all of SECO's crude oil reselling activities. He signed all of the purchase, sale, and exchange contracts. Defendant Scruggs also was the sole shareholder of defendant SECO and was a director of defendant SECO.

30. On May 6, 1980, Guillory was elected by Scruggs to be the other director of SECO, as well as Vice-President, Secretary, and Treasurer.

31. From May 1980 through January 1981, Scruggs and Guillory together conducted virtually all of and controlled the reselling activities of SECO.

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COUNT I

32. The United States repeats and realleges each allegation of paragraph 1 through 31.

33. During the period August 1979 through April 1980, SECO resold crude oil in 56 transactions at prices in excess of the acquisition cost thereof without performing any service or other function traditionally and historically associated with the resale of crude oil in violation of 10 C.F.R. § 212.186.

34. In reselling the crude oil in these transactions, SECO pursued a practice that constituted a means of obtaining prices for the crude oil that were higher than those permitted by the regulations in violation of 10 C.F.R. § 210.62(c).

35. In reselling the crude oil in these transactions, SECO also pursued a practice that circumvented and contravened or resulted in the circumvention or contravention of applicable regulations in violation of 10 C.F.R. § 205.202.

36. As a result of these transactions, SECO and Scruggs are jointly and severally liable for $1,479,377.00 in illegal overcharges plus interest thereon.

37. Interest on the overcharges stated in the preceding paragraph totalled $2,246,676.00 through March 31, 1987.

COUNT II

38. The United States repeats and realleges each allegation of paragraphs 1 through 31.

39. During the period May 1980 through January 1981, SECO resold crude oil in 137 transactions at prices in excess of the acquisition cost thereof without performing any service or other

function traditionally and historically associated with the resale of crude oil in violation of 10 C.F.R. § 212.186.

40. In reselling the crude oil in these transactions, SECO pursued a practice that constituted a means of obtaining prices for the crude oil that were higher than those permitted by the regulations in violation of 10 C.F.R. § 210.62(c).

41. In reselling the crude oil in these transactions, SECO also pursued a practice that circumvented and contravened or resulted in the circumvention or contravention of applicable regulations in violation of 10 C.F.R. § 205.202.

42. As a result of these transactions, SECO, Scruggs, and Guillory are jointly and severally liable for $11,822,937.00 in illegal overcharges plus interest thereon.

43. Interest on the overcharges stated in the preceding paragraph totalled $14,722,829.00 through March 31, 1987.

PRAYER FOR RELIEF

WHEREFORE, the United States of America requests that this Court enter judgment in its favor:

1. Declaring that SECO, Scruggs, and Guillory have violated the Emergency Petroleum Allocation Act and the applicable regulations as alleged herein;

2. Ordering SECO, Scruggs, and Guillory to pay to the United States $13,302,314.00, which is the amount by which the prices charged by defendants in their resales of crude oil exceeded the acquisition costs of the crude oil resold, plus interest thereon (which totalled $16,969,504.00 through March 31, 1987);

3. Requiring defendants to pay the cost of this suit as provided in 28 U.S.C. § 2412; and

4. Granting the United States such other and further relief as this Court may deem just and proper.

Respectfully submitted,

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The CHAIRMAN. Well, you can just tell us what happened.

Mr. GUILLORY. Well, I mean, the gist of it is I'm living two lives. I thought I was a successful businessman, and come to find out I'm a failure. I mean, if I owe someone $26 million for something I didn't do, I mean, where did I go wrong?

The CHAIRMAN. How much money did you make out of this thing?

Mr. GUILLORY. I made comparable wages with the industry. I was on a base salary, $10,000 a month. This was a promotion. I began my career with Shell Oil Company as a laborer in the fields of south Louisiana. And I have a degree. I worked my way through the industry in a position with a smaller—where I had an opportunity to leave a major and go with a smaller company.

The CHAIRMAN. Well, first of all, let me get this straight. You were an employee making about 10 grand a month for Scruggs Energy.

Mr. GUILLORY. For Scruggs Energy, plus my bonuses, performance bonuses, whatever, which were typical of the industry.

The CHAIRMAN. Yes. And how much were you making a year?

Mr. GUILLORY. $700,000, $600,000.

The CHAIRMAN. You made $10,000 a month. That's $120,000.

Mr. GUILLORY. I mean that is to include the—the bonuses were $400,000, $500,000.

The CHAIRMAN. Okay.

Mr. GUILLORY. And it just not——

The CHAIRMAN. Did you own the company?

Mr. GUILLORY. No, sir.

The CHAIRMAN. How much of Scruggs Energy did you own?

Mr. GUILLORY. None. I was a non-owner.

The CHAIRMAN. Now, how did you make so much money not being an owner?

Mr. GUILLORY. Well, sir, when I went to work, every time I made a move it was for more money and an opportunity to better myself. I had several promotions through the ranks of Shell Oil Company. Then I was hired away——

The CHAIRMAN. You went from Shell to Scruggs?

Mr. GUILLORY. No, sir. I went to a company called P&O Falco.

The CHAIRMAN. P&O Falco?

Mr. GUILLORY. Correct.

The CHAIRMAN. That's up in Bossier City, Louisiana.

Mr. GUILLORY. Right.

The CHAIRMAN. What were you making at P&O when you left?

Mr. GUILLORY. When I left there, $450,000 a year.

The CHAIRMAN. And you were doing what for them?

Mr. GUILLORY. I was the vice president in charge of crude oil operations on the Gulf Coast.

The CHAIRMAN. So, you were an experienced person in crude oil operations.

Mr. GUILLORY. Yes, sir.

I can read this, but it's kind of like reliving my past which has been pretty hard. And I mean, if you want me to continue to read it, I'll read it.

The CHAIRMAN. It is in record.

Mr. GUILLORY. It's just I get kind of choked up about this thing. This thing has been pretty hard.

The CHAIRMAN. I understand that. First of all, we want to establish—is this correct—that you were employed. You went from one company making a lot of money to another company.

Mr. GUILLORY. That's correct.

The CHAIRMAN. In a field in which you had expertise.

Mr. GUILLORY. Exactly. And I also might mention that I was recruited from each job. I mean, I didn't go out and solicit job opportunities. I mean, people came to me and asked me if I were interested in bettering my career and moving forward with my career. And naturally, I was interested.

The CHAIRMAN. All right. This $26 million which you are being charged with—other than the salary you received, which was about commensurate with what you had made in other jobs——

Mr. GUILLORY. Which was common in the industry, I mean, for people with my expertise. They were all earned income. I mean, all my wages were reported to the Federal Government. You know, it's common knowledge what I made.

The CHAIRMAN. All right. And you had no interest in the company. So, if they made $26 million, if that's what they made, you didn't get any part of that other than——

Mr. GUILLORY. My salary and bonuses.

The CHAIRMAN. Salary and bonus.

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. Okay.

Now, what did you do that caused you to be the central figure?

Mr. GUILLORY. I was a crude oil trader and I was responsible—back in the 1970s when I was with Shell and I was in a fairly responsible position with Shell, I saw an opportunity. The government at that time was talking divestiture of the major oil companies. And with the knowledge that Shell had given me in my training with them, I felt like that I had an opportunity not only to better myself, but also to put together something very constructive for someone else, I mean, with my expertise.

So, in June of 1976, I left Shell Oil Company and went to P&O Falco. I mean, they came down to me and asked me if I was interested in taking a position with them. I was the first major oil company employee in their company. And with my expertise, we started supplying small refiners and moving crude oil around in various trades.

The CHAIRMAN. As I understand it, the government encouraged small refiners to get into this business. I know we passed in this committee that came to law the Small Refiners Bias. And they actually almost recruited people to get in that business, didn't they?

Mr. GUILLORY. That's correct. As a matter of fact, "reseller" is a hard word for me because I felt like that I was out there—the small refinery that was created because of in my opinion—and I'm not an attorney, but in my opinion were created because of the controls—they were not fully integrated oil companies. All they did was put up some hardware, and they needed to go out and procure a supply of crude oil, okay, to run in their refineries. That is where my expertise came in. I was able to find oil for these people to run in their refineries. I mean, obviously——

The CHAIRMAN. Can you describe simply and fairly quickly what it is that you did that constituted the violation here that they allege?

Mr. GUILLORY. In the court action that is against me now, the only allegation that is on SECO, myself and W.W. Scruggs is the definition of layering, and they interpreted layering to be any type of in-line transfer. Where you didn't physically put oil in your truck or put it in your pipeline, then you didn't perform an industry service. And, therefore, any proceeds that were made by this transaction are not allowed.

The CHAIRMAN. Now, in your interpretation of layering, which they say is now a violation, what did you do to try to find out what layering meant?

Mr. GUILLORY. This goes from the day while I was with Shell through P&O Falco through Scruggs. We were at all times in touch with attorneys trying to get legal interpretations of what the regulations meant. There was a lot of ambiguity or ambiguous interpretations of the regs.

The CHAIRMAN. Did you follow legal advice?

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. Did these other companies do the same thing? Was this an industry-wide interpretation?

Mr. GUILLORY. That was the industry practice. I mean, when I made—obviously, I didn't own a pipeline with Scruggs Energy, but I was able to nominate the crude oil that I bought and the crude oil that I sold into various pipeline systems that were owned and operated by the bigger people.

The CHAIRMAN. Did the Department of Energy know what you were doing?

Mr. GUILLORY. Well, yes, sir. On a monthly basis you filled out forms, the ERA–69s, whatever, telling exactly what you did.

The CHAIRMAN. So that they were aware of this layering or whatever it was.

Mr. GUILLORY. The in-line transfers.

The CHAIRMAN. Say again?

Mr. GUILLORY. The in-line transfers, yes, sir. I'm not calling it layering. They're calling it layering.

The CHAIRMAN. They called it layering afterwards.

Mr. GUILLORY. Yes.

The CHAIRMAN. But I mean, they were aware of the factual practices which you were doing.

Mr. GUILLORY. To my knowledge they were.

The CHAIRMAN. I mean, it appeared on your reports.

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. Was there ever any discussion of that with anyone from DOE?

Mr. GUILLORY. No, sir. I've never personally spoken to DOE. The only correspondence I've received is through the mail, and my attorneys talked to them, but I have not talked to them directly.

The CHAIRMAN. Your attorneys did speak to them?

Mr. GUILLORY. Yes.

The CHAIRMAN. And how do you know your attorneys spoke to them?

Mr. GUILLORY. Well, I'm talking about in this litigation. I mean, beforehand in interpreting the regs? Is that the question?

The CHAIRMAN. Yes.

Mr. GUILLORY. I mean, they came back with answers, so I guess they did. I mean, I didn't—well, who did you talk to at the DOE? I didn't ask that.

The CHAIRMAN. But they did tell you they had been in touch with them?

Mr. GUILLORY. Yes. I mean, that was common practice. This goes back to 1976, 1977, 1978, 1979, 1980, and 1981, I mean, January 1 of 1981 when the regs—when crude oil was decontrolled.

The CHAIRMAN. I see.

Now, in the complaint against you—and I have a complaint here. By the way, did anybody ever come by to see about this complaint or question you about it?

Mr. GUILLORY. From where?

The CHAIRMAN. From the Department of Energy?

Mr. GUILLORY. No, sir.

The CHAIRMAN. What was the first notice you had of this lawsuit against you?

Mr. GUILLORY. They called and asked my wife if I was the Donald W. Guillory that was employed by P&O Falco and Scruggs Energy, and if so, was my correct address such and such. And they confirmed that, and then a couple of weeks later I received notification. I received a PRO in the beginning and it was in effect for about four months. And then it was dismissed without prejudice and then about eight months later, the civil action was taken against me.

The CHAIRMAN. This is April 24, 1987.

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. And the acts that——

Mr. GUILLORY. The PRO was dismissed in June of 1986.

The CHAIRMAN. When were the acts committed that you are alleged to have done?

Mr. GUILLORY. I was with SECO from March of—I beg your pardon—April of 1980 until March of 1981.

The CHAIRMAN. All right 1980 and 1981, so that when this was filed on you, it was roughly six years later.

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. Now, this does not allege negligence or bad faith or intentional or any of those things on you. I have the complaint here, and that is correct, is it not?

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. Now, where are the Scruggs Energy Company and Bill Scruggs now?

Mr. GUILLORY. When I left him in March of 1981, they went into some drilling programs. The bottom line was SECO was dissolved I think in 1984, something like that. I mean, they ran out of money.

The CHAIRMAN. So, they are broke.

Mr. GUILLORY. They're dissolved, yes, sir.

The CHAIRMAN. How about Bill Scruggs?

Mr. GUILLORY. I don't know his personal finances. I don't know what he has got.

The CHAIRMAN. He doesn't have $26 million.

Mr. GUILLORY. I wouldn't think so, no, sir. I don't think that company ever made that kind of money.

The CHAIRMAN. Now, do you have $26 million?

Mr. GUILLORY. Not in my pocket, no, sir.

The CHAIRMAN. I mean, could you respond in damages to that?

Mr. GUILLORY. No, sir, not in my lifetime.

The CHAIRMAN. And you did not receive any benefit from this other than the salary——

Mr. GUILLORY. My salary and my bonuses which were industry practice. I mean, I was out there trying to better myself. I mean, I had the American dream. I mean, you take off as a field hand and you want to go as high as you can. That's what America is all about I thought.

The CHAIRMAN. Were you aware that what you were doing might be illegal?

Mr. GUILLORY. No, sir, because in order to do business when I was brought into the industry in 1971, the first thing they taught you—the old school taught you—was integrity was the name of the game. I mean, you did a lot of your deals by the handshake in the field, you know. So, consequently, I attributed that to my success more than anything else. I did what I said I'd do and in the proper manner.

And I'm not an attorney, and I can't interpret. I can't be 100 percent right every time. I mean, when you start reading these regs even today, you can get so many different meanings out of them.

The CHAIRMAN. Who were your lawyers?

Mr. GUILLORY. Over the course of years?

The CHAIRMAN. How did you pick your lawyers? Were they the best you could find?

Mr. GUILLORY. Well, mainly by industry reputation as being well-versed, having a good DOE or FEA or FEO group, you know, that was well-versed in the regs.

The CHAIRMAN. Well, without respect to who they were because I don't want to get into that, they were well-known lawyers who represented major companies.

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. They were not some fly-by-night——

Mr. GUILLORY. No, sir. I'm not here to point fingers or anything. I'm just telling my story of what happened to me.

Senator MCCLURE. May I ask one question?

The CHAIRMAN. Yes, certainly.

Senator MCCLURE. Mr. Guillory, it says in the complaint you have identified yourself as an employee of Scruggs or SECO.

Mr. GUILLORY. Yes, sir.

Senator MCCLURE. You are identified in the complaint as the other director of SECO——

Mr. GUILLORY. Yes, sir.

Senator MCCLURE [continuing]. As well as vice president, secretary and treasurer.

Mr. GUILLORY. Yes, sir.

Senator MCCLURE. Is that correct?

Mr. GUILLORY. Yes, sir.

Senator MCCLURE. So, at least on the face of it, you are more than just an employee.

Mr. GUILLORY. Well, yes, sir. I mean, I was hired and I was paid the monies I was paid for my expertise. I mean, I was a crude oil trader, and I was responsible for the activities, you know, that I conducted. And again, you know, the trading position—we were out there. I feel like or I know personally—and the reason I left Shell Oil Company with a good future ahead of me was I felt like I could improve myself as a small businessman in the industry because with divestiture, I mean, you could compete with the majors.

The CHAIRMAN. I'll tell you what. Let's hear from Mr. Turner, and then we can come back for questions. Mr. Turner, you are not from Louisiana.

Mr. TURNER. No, but I'm thinking of moving. [Laughter.]

The CHAIRMAN. Well, we'll welcome you there.

This is Malcolm Turner from Dallas, Texas.

STATEMENT OF MALCOLM M. TURNER, DALLAS, TX

Mr. TURNER. We do have a good employee that we refer to as a Coon'ss from Eunice, and he is an LSU graduate.

Well, Senators, I noted a while ago that Mr. van Orman asked you to take comfort in his careful and judicious use of this theory of personal liability, and my understanding is that your staff picked Bayport Refining because, quite contrary to that, it is one of the most abusive—examples of abusive acts of DOE of applying this theory. And I don't mind telling you that I'm fearful, as my friend here. I've never met him before, but I'm fearful of continued abusive tactics of the Department of Energy, and I'm not very comfortable being here.

The CHAIRMAN. Well, tell us what happened.

Mr. TURNER. I'll tell you what happened, but first I do want to give you some background to distinguish this situation with some of those that you have heard about. Very briefly, I'm a chemical engineer by education. I worked for Continental Oil, and I've been in the petroleum industry for some 30 years. I am currently president of the consulting firm of Turner, Mason and Company in Dallas, and this firm was organized in 1971. I was a founder.

Just briefly you should know that this firm is highly respected today having worked for numerous financial institutions, major companies, the government agencies, trade associations. For example, we were selected by the API to assist them in a technical response regarding the EPA's proposed gasoline regulations. Our clients have included over the years as extreme as, oh, Aristotle Onassis on a refinery project to Australia where I negotiated first natural gas sales contract to working for OSHA. In other words, we have prided ourselves in working not for just a narrow segment of the industry, but we have worked for lawyers and government agencies.

[The prepared statement of Mr. Turner follows:]

TESTIMONY OF MALCOLM M. TURNER

BEFORE THE SENATE ENERGY AND NATURAL RESOURCES COMMITTEE

May 19, 1988

Good morning Mr. Chairman. I am honored to appear today before the Senate Energy and Natural Resources Committee as it hears testimony on the effect of the June 1987 decision of the Temporary Emergency Court of Appeals in the Citronelle case. As one who has been a victim of Department of Energy harassment and prosecution since 1984, I believe I can provide for you a valuable perspective on the effect of this decision on law-abiding members of the petroleum industry.

First, let me tell you a little bit about myself. I hold B.A. and M.S. degrees in chemical engineering from Rice University and have worked in the petroleum industry for nearly 30 years. After initial employment by Conoco, I became a founder of the consulting firm of Turner, Mason & Company in 1971. This firm is widely recognized as expert in the petroleum industry and its clients include virtually all major financial institutions, trade associations, various government agencies as well as operating companies. During the 1970s, in particular, I was regarded as expert in the marketing, gathering, storage and transportation of crude oil and other activities related to supplying refineries with feedstocks. Numerous government agencies, major integrated oil companies, independents, and financial institutions, retained our firm concerning a wide variety of

petroleum issues. For example, William Simon retained Turner, Mason as a consultant and contributor to the formation of the Federal Energy Office in 1973. We provided consulting services to FEO's predecessor and successor entities, including DOE. As a consultant and advisor to these agencies, I became intimately acquainted with what ultimately evolved into DOE's complex and controversial petroleum price regulations.

As a consequence of my involvement in these activities, I have gained extensive knowledge of crude oil markets and the functions performed by independent crude oil resellers. I am very familiar with what constitutes "normal business transactions" in the crude oil industry and have testified in Federal Court as well as other arenas as expert in this area. Finally, I am knowledgeable as to what services and other functions were traditionally and historically associated with the resale of crude oil.

At the urging of clients, I founded and served as President of Bayport Refining Company, a modest crude oil reseller for the purpose of serving independent producers refiners and marketers in responding to the prevailing regulatory environment. Through 1982, Bayport engaged in the purchase and resale of foreign and domestic crude oil. Bayport played a critical role in the efficient functioning of crude oil markets and in the crude oil supply and transportation systems. Bayport's activities helped

alleviate the rigidities and severe inefficiencies introduced into the crude oil markets by DOE regulations.

In spite of well documented facts proving otherwise, the Department of Energy, in September 1984, accused Bayport as well as three individual officers, including myself, and a consultant of violating DOE regulations. Incredibly, DOE claimed that Bayport's individual officers were liable to the government for $18.3 million plus interest through August 31, 1984 -- for a total of nearly $22 million. (Now, including interest, DOE claims a total of more than $40 million.) Since 1984, DOE has persisted in its absurd allegations in the face of audited reports by the Big Eight accountant Coopers & Lybrand which establish that during all of its years of operation Bayport's total earnings were $1.3 million and the Company never exceeded allowable price margins. Moreover, Bayport's accounting records of millions of barrels of multiple tiers of crude oil balanced exactly. There was no "disappearance" whatsoever of "old oil" or any miscertifications.

DOE's continued attacks on me and my colleaques amount to a witch hunt and effort at character assassination which remind me more of Gestapo tactics than anything else. Apparently their malicious "accounting procedures" confuse revenues (as illegal profits) and expenses (as improper deductions). Please do not mistake me or my former Company with highly publicized crude traders such as Marc Rich, who allegedly willfully and knowingly abused DOE regulations.

So far I have had to pay lawyers and accountants over $100,000 to defend myself against DOE's nonsensical charges. Meanwhile, there seems to be no end to DOE's resources for harassing innocent citizens and companies, all while perpetuating jobs for entrenched bureaucrats at taxpayer's expense.

The fact is that in every crude oil transaction that Bayport entered into, the company performed some service or function traditionally and historically associated with the resale of crude oil. Therefore, it could not have possibly violated the pricing regulations as DOE alleges. Bayport never inserted itself into any "daisy chain" of pre-existing purchasers and sellers of crude oil for the purpose of inflating the cost of the crude, and DOE does not even assert such violations. I firmly believe that the reselling activities of Bayport resulted in increased competition among petroleum refiners and ultimately in substantial cost savings for the American consumer. They also advanced the operation of DOE's price controls by minimizing the resultant market interference and by enhancing competition.

Let me address the remaining portion of my remarks to the Temporary Emergency Court of Appeals decision in the Citronelle case last June. This decision is so confused and confusing, so filled with tortuous logic and bad reasoning, that it deserves to be overturned by the Congress at the earliest possible time. If Citronelle stays on the books, a person like myself -- who never had any knowledge or

malicious intent to violate any petroleum price regulations -- can be held personally liable to the full extent of his net worth for alleged corporate violations.

In the Johnson Oil case, TECA held that corporate officers and directors could only be held liable for regulatory violations of the corporation "if their authorization of such violations was knowing, willful or malicious." The Johnson Oil standard was clear and straightforward. It basically said that if you knowingly violated any government regulations, you would be held personally liable for your wrongful acts. But in the Bayport case, DOE has not submitted any evidence at all or even alleged that the individual defendants authorized violations of the price regulations knowingly, willfully or maliciously. Clearly, DOE has failed to meet the standard for personal liability that TECA laid down in Johnson Oil.

Then came the Sutton case in 1986, when TECA held that a corporate officer who had personally engaged an intentional "tortious conduct" could be held personally liable for corporate violations. TECA used the most ambiguous phrase I've ever heard in holding that a person who is "the animating force" for regulatory violations could be held personally liable even thought he didn't personally receive illicit gains. I am told that Sutton involved a criminal scheme to miscertify crude oil. Also, I'm told that in Sutton, the defendant used his corporate entities to implement a criminal design. There was evidence of

diversion of corporate funds for personal purposes, use of corporate assets for personal expenses, and payment of excessive compensation to the individual defendants. In Bayport, DOE has never argued or alleged in any respect that any individual diverted corporate funds for personal expenses or engaged in any of the criminal violations present in the Sutton case.

Let's go on to the Citronelle case. In Citronelle, TECA took its standard of "intentional tortious conduct" and applied it in a context that did not entail any criminal violation. Citronelle held that if a corporate officer committed an honest mistake on the advice of counsel and was "an animating force" for the alleged corporate violations, then the individual could be held personally liable to the full extent of his net worth. Look at what that decision means when applied to an individual such as myself. I am an honest businessman with extensive knowledge of crude oil markets. When I ran Bayport, I believed and knew at all times that I was operating the company fully in accordance with DOE's petroleum price regulations. I never thought at any time that I was pursuing a marginal or risky course of conduct. Certainly, I never had any knowledge of petroleum price violations or any intent to violate those regulations. Yet under the Citronelle decision, DOE now forces me to face more than $40 million in personal liability for activities that were legal and in complete compliance with DOE regulations.

I assure you that this prospective personal liability has caused great anguish and concern to me personally and also to my family. It has significantly diminished my reputation and status in my church and community, as rumors have circulated over the years. I stand today in fear of facing personal bankruptcy, irreparably damaging my consulting business and professional career -- all the result of abusive excesses by DOE bureaucrats.

Mr. Chairman, I urge this committee to introduce legislation that would overturn the Citronelle decision that TECA handed down last June. It is an established principle of constitutional law that a statute or regulation cannot be vague or overly broad. I submit that the "animating force" standard is so vague and so overbroad that it does not fully inform citizens of what the law requires. In seeking to hold members of the petroleum industry liable for actions that they either knew or believed were in full compliance with petroleum price regulations, this decision violates the standards of justice and fair play that Americans hold so dear.

The CHAIRMAN. Didn't you advise Bill Simon?

Mr. TURNER. Well, in fact, in 1973, just prior to the passage of the Emergency Petroleum Allocation Act, I was working personally and our firm was working for Mr. Simon who at that time I believe was in the Department of the Treasury. He had a small oil group there. And when that act was passed, it was the responsibility of the newly organized FEO to implement regulations. And we did assist him with that.

Subsequently I personally and our firm was retained over the next several months to aid FEO and its successors all the way through DOE in responding or writing regulations.

The CHAIRMAN. Now you were a founder of that firm?

Mr. TURNER. I was a founder of Turner Mason, yes. In fact, one of the things I should mention is that our advice at this time was—it was a little frustrating because we specifically opposed the introduction of the entitlements system and our recommendations I think finished 13th on a list of 13 because the DOE bureaucrats favored that kind of system which would enlarge their function.

And I can say that the only work that I'm really proud of that we did for the DOE was subsequently our firm developed the models that assisted in the development of the strategic petroleum reserve as we helped locate the places and the qualities of crude oil and the quantities and this kind of thing. And it is my understanding that our work which was used then is still used by the government in some of its modeling.

So, I'm not trying to brag for the purpose other than to establish that we do have an excellent reputation. I personally work a great deal today in mergers and acquisitions and appraisals, and there is something more here than money to lose. And my reputation is excellent and so is our firm. And we have worked for an extremely wide variety of clients.

Now, in the course of this work, obviously, we are very familiar with the Department of Energy and its regulations. We even were retained to define what constituted a refinery, what kind of crude oil processing capacity it had, in order to prevent abuses of the regulations. You mentioned the Small Refiner Bias. As you know, there was an outcropping of that kind of thing, and our firm helped develop the definitions so that it would weed out the offenders. So, we were well-versed, and I personally was regarded as an expert in crude oil uses, qualities, gatherings, and so on.

And during the middle 1970s, some of our customers, primarily financial institutions, would have producer clients or small refiner clients, and as a result of encouragement from them, we organized a company called Bayport Refining Company.

The CHAIRMAN. You say as a result of their encouragement?

Mr. TURNER. Yes, because as I think Mr. Guillory mentioned, many newcomers were thrown into this industry which had been traditionally handled by only a few because of control of pipeline systems and the crude oil supply systems were quite changed as a result of regulations. I don't think anyone visualized the extent of how the industry would change because of that, but that was certainly the result. There were many, many new entries. And he is certainly right. There was a code of honor there. You did handshake deals involving quite a bit of money.

But producers who were plagued with onerous controls in their opinion would be advised that they had the rights to integrate forward, have their crude transferred, processed in a refinery under an agreement, take the products and sell them and realize more for them. Well, they didn't know how to do that.

In addition, new entries into the refining business—and there were many—didn't have crude oil purchasing departments, and our firm was recognized as knowledgeable in that. And we would perform services, and I would. So, I used Bayport Refining Company because in the course of all this you would take on larger volumes than just associated with one—like offshore royalty oil of Louisiana, how you take 300 barrels a day, but you could combine it with other refiners and trade it and deliver it in to refiners in quantities and qualities. And that is a very important type that was useful for them.

So, that was the birth of Bayport Refining. I ran it primarily myself, but it was owned originally by three people, Harry Mason, and then Olene Crumpton, who you were mentioning earlier in the question of part-time secretary. In addition, we had a CPA named Robert Houser, who was neither an employee nor a shareholder nor an officer of the company during the audit period. I agree with your outrage. All of these parties have been named as personally liable for damages that although they were originally—and this PRO was issued I believe in 1984 naming me and these other parties as personally liable. And I don't see how Mr. van Orman can stretch that as judicious use of the principle.

The claims were $20 million odd which subsequently to risen to some $40 million. In the history of Bayport Refining Company, we have audited reports by a Big 8 firm, Coopers & Lybrand, that the entire earnings were just over $1 million.

The CHAIRMAN. Just over $1 million?

Mr. TURNER. Just over $1 million.

The salaries paid to me were $4,000 a month. We never declared any dividends, and one of the allegations was that this was not a corporation because it didn't pay big dividends. And yet, he is saying that we weren't a corporation because of that, and yet clearly under Texas law, if you will follow our response, we complied fully with all of Texas and Federal laws.

The CHAIRMAN. Were you the principal owner of the corporation?

Mr. TURNER. I was not the majority owner. I was the president. Mr. Mason, who was my partner in Turner Mason, was an owner. Ms. Crumpton was made a shareholder and an officer for reasons that are very sad. Her husband was dying and she was ill herself. He was dying of cancer. And we used it to get medical benefits for her that were not available in her regular employment.

The CHAIRMAN. How much did she own of the company?

Mr. TURNER. I think it was 2 or 3 percent, something like that.

The CHAIRMAN. Which was worth?

Mr. TURNER. Well, ultimately I think the cost of it was $10 a share, and she paid for it.

The CHAIRMAN. How many shares?

Mr. TURNER. I think 200 shares is what she had at $10 a share.

The CHAIRMAN. What is that? Roughly 2,000 bucks' worth of stock?

Mr. TURNER. Yes. I think that is correct.

The CHAIRMAN. And she was paid what kind of money?

Mr. TURNER. It was $200 a month.

The CHAIRMAN. And all they want is $40 million from her?

Mr. TURNER. Yes.

And I would like to relate to you some of the rather abusive tactics, and I think it would be embarrassing to Mr. van Orman if he fully knew about it, and I assume he doesn't. In Dallas in 1984 DOE had what I would just call goons, and they would come to our office. And they had apparently some kind of right of service. And they would march around, and where's Ms. Crumpton and try to serve her. She was ultimately made to give a deposition.

They went to Mr. Houser's house, who lived 20 miles from the office, and they shocked his wife by presenting her with a claim for $20 million something and told her he was involved in a bunch of illegal oil schemes, and then came another time and took it upon themselves to go to the neighbors of Mr. Houser and tell them what they thought about him.

Well, we did have good legal counsel. I always learned to use that.

The CHAIRMAN. And Houser was a stockholder, was he?

Mr. TURNER. He was not a stockholder at all during the audit period. After the audit period, he did become a small shareholder. Ms. Crumpton, of course——

The CHAIRMAN. Well, what did he have to do with it?

Mr. TURNER. Mr. Houser handled all of the forms. You call them what? ERA-69s?

Mr. GUILLORY. Yes.

Mr. TURNER. All of the monthly forms. He was a CPA, and he handled all of that type of work.

The CHAIRMAN. And what was he paid by the company?

Mr. TURNER. He was paid nothing. He was a consultant. He was employee of Turner Mason. I believe Mr. Houser's salary at the time was $35,000.

The CHAIRMAN. He did consulting and he was paid fees of $35,000. Was he on an hourly basis or a monthly——

Mr. TURNER. His fees were probably $40 an hour, which was the rate that——

The CHAIRMAN. He was just a CPA doing hourly work.

Mr. TURNER. Yes, that's correct.

The CHAIRMAN. Not as a share in the profits or——

Mr. TURNER. No. Mr. Houser never received any substantial compensation from the company or from any of the results of the company.

The CHAIRMAN. And no compensation related to the success of the corporation.

Mr. TURNER. No, he did not.

The CHAIRMAN. And he is also being asked to pay.

Mr. TURNER. He is named as personally liable.

Ms. Crumpton is dead now, and only after she died and after considerable effort by our excellent counsel would DOE remove her and her estate from being named as liable.

I just tell you these things because I think they are embarrassing to us as citizens to know that such abuses would be used against clearly innocent people.

The CHAIRMAN. Now, let me ask you about your case. What do they allege that you did?

Mr. TURNER. As a matter of fact, I wouldn't be good at saying what it is because in the face of the overwhelming documented evidence certified by a very reputable CPA firm that the earnings of the entire history were just over $1 million—I think $1.3 million—it is very difficult for me to come up with a concept that you've made $20 million something. So, I don't believe I'd be very good at telling you what——

The CHAIRMAN. Did they allege that you were negligent or that you intentionally did anything wrong?

Mr. TURNER. No. I have never been accused of willful. I understand just learning a little bit today from the professor and the other testimony about this tortious conduct and everything—I've never been accused of knowingly, willfully, anything of the sort, and neither has anyone else in this case.

The CHAIRMAN. They gave you a complaint, a suit in Federal court.

Mr. TURNER. No.

The CHAIRMAN. Or is this just a PRO?

Mr. TURNER. It's still in OHA I believe, the Office of Hearings and Appeals.

The CHAIRMAN. Okay. But there was an allegation, some piece of paper that sets for the allegations, wasn't there?

Mr. TURNER. Absolutely. The PRO names these four persons as personally liable.

The CHAIRMAN. And does it say what you did?

Mr. TURNER. Again, it basically takes sales in all of the transactions that they believe made money and say those were illegal, and it basically takes related sales and where monies were not made and says those were okay. So, losses are okay. You can't deduct them. I mean, you can deduct them, but you don't have any revenue. So, they disallowed—by any concept of accounting, you can't make any sense out of the——

The CHAIRMAN. The point I'm making is there is no allegation of bad faith, negligence, or——

Mr. TURNER. No.

The CHAIRMAN. Really, I don't know whether PROs are supposed to state that or not as in a lawsuit, but in any event, no one has ever accused you of that.

Mr. TURNER. No.

The CHAIRMAN. Can you respond if found liable for $40 million? Could you pay it?

Mr. TURNER. No, sir. No. I have a very good reputation, and I have had a good reputation in my community and my church and as a professional consultant. My clients are of the best known names. I could go on and on. But there have been rumors around neighborhoods about illegal profits. My reputation has been harmed already, and I am clearly faced with personal bankruptcy if this is not dismissed.

I noted that one of the remedies I believe given to you, Senator McClure, was for there not to be any violations. That is the best defense. And we are certainly going to prevail on that because we didn't do anything illegal or improper. I know we didn't because I do know the regulations.

I have served—and this might have something to do with the Department of Energy's insistence on continuing to attack me. I have served as an expert consultant to Cities Service, who is one of the biggest cases for several hundred million dollars. We have served for Dorcester, which was a recently settled case. We have worked for Diamond Shamrock. We've worked for Tesoro. Currently there is a very large issue with them in crude oil trades. Even though we have done a lot of work for the Department of Energy, this particular regime of people that came along in the 1980s, who were not involved in the 1970s, don't seem to appreciate some of the work that we have done there although it has just been in a professional capacity only.

The CHAIRMAN. Senator McClure.

Senator MCCLURE. I have no questions.

The CHAIRMAN. Well, gentlemen, it really concerns me immensely that this kind of thing can go on. Unfortunately, the only people that seem to share the sense of outrage are a few of us on this committee. I don't see the press here. Maybe they are. I wish they would listen. I mean, this is a real outrage. And it is going on I guess it is because it's the oil industry and everybody has that image of the big oil men flying in jets with big cigars.

Mr. GUILLORY. There aren't too many J.R. Ewings in Louisiana right now.

The CHAIRMAN. Excuse me?

Mr. GUILLORY. There aren't that many J.R. Ewings around today.

The CHAIRMAN. Well, there are not nearly as many as there used to be I can tell you that.

Senator MCCLURE. Well, Mr. Chairman, I think it is fair to note, and I feel compelled to do so, that we have heard a lot of talk from some people about the fact that DOE was not doing enough, that there are a lot of guys out there that were cheating the system, deliberately gouging consumers, running up the prices illegally, and that obviously the Department wasn't doing enough to get at the root of this problem. I don't know how many times I have heard that said by members of this committee. But I don't share that and never have shared that feeling. And I think what we may be seeing here is the result of the Department reacting to some of that pressure to go out and find the wrongdoers, and I hope they do go out and find wrongdoers.

But I would share the Chairman's feeling of outrage that it is possible today to find people that are ruined in their own personal lives and businesses when there is no allegation that there was anything wrong done by those individuals or that they profited from it at all. That is the thing that really gets to me. If there were any charge, any expectation that you had done something wrong, they might be mistaken, but they would at least have a basis. Or if there was any charge or any expectation that you had personally profited unduly from these actions, that would also perhaps at

least be understandable. But to have them bring charges against people that they have not charged with wrongdoing, that they don't even charge with having made any money out of it, doesn't seem to me to stand any kind of test of the equal-handed application of justice.

The CHAIRMAN. Professor Junger is going to give us some language here. But we shouldn't have to enact a Federal law to correct such a clear, clear abuse. I mean, honestly. And this administration of all administrations, having trotted out all this business about abolishing the Department of Energy, and then allowing this kind of outrage to go on I think is just unforgivable. It is hypocrisy to the ultimate.

And I hope now that the facts are out—I mean, I hope that charge is incorrect. After all, maybe they didn't know. Maybe our witnesses on the first panel didn't know this kind of thing is going on. Maybe not. Now they do. And if it proceeds, it really is hypocrisy. You talk about somebody that ought to be punished; it is those who would continue with this kind of policy. Really.

You had something to add, Mr. Guillory?

Mr. GUILLORY. Yes, Senator. I don't feel like I am an exception. I've got some friends in the industry that are going through the same thing that I'm going through.

The CHAIRMAN. You do?

Mr. GUILLORY. Yes, sir.

The CHAIRMAN. How many of them?

Mr. GUILLORY. Sir?

The CHAIRMAN. How many of them that you know of?

Mr. GUILLORY. Several, and I mean, they are just friends that I've known in my lifetime.

Senator MCCLURE. Mr. Chairman, I indeed hope we find an answer. I hope we don't have to pass legislation, and I hope some of the obvious injustices are corrected as quickly as possible. But I will guarantee you that if the Department does drop some pending actions, that there will be statements made before some committee of the Congress by some Members of the Congress at which the press tables will be crowded as the government is charged with letting the fat cats off.

The CHAIRMAN. Well, that's true. And if that happens, I'll come to their aid.

Mr. TURNER. Senators, I would just like to note this. In the industry—of course, its reputation is its reputation, but I have dealt over 30 years in the business, and during the course of these transactions which handled, literally in terms of revenues, millions of dollars, I was never cheated one single time. I have never met those—I have never dealt with the alleged crooks. Of course, we have the *Sutton* case which is infamous. We have the Mark Rich allegations. We have the West Texas Marketing. I know about those, but I think they comprise—and there are others I'm sure. But personally I've only dealt with people in major companies and small companies were quite honorable. They did perform as they agreed to. They carried out their contracts, and I was never cheated.

So, I think that we clearly have a case here of overzealousness, the Department of Energy not understanding in many cases, but

just taking on all comers and saying every transaction that was done is crooked because everybody is a crook. And that certainly is not the case. I think as in any industry, a huge majority of the business people are honest and they are trying to, as you point out, respond profitably to the regulations.

The CHAIRMAN. And it's not enough to say you have your right to go to court because in the first place, under the *Citronelle* case, lack of negligence or lack of intent or any of that is not a defense. You can't go to a jury. And even if you did have all those defenses, you have to spend an enormous amount of money and have your reputation damaged in the meantime. It just shouldn't happen in this case. And to me it is very clear that *Citronelle* was wrong not because I knew about all——

Senator MCCLURE. The case was wrong.

The CHAIRMAN. Yes, the case was wrong not because I knew about all the law that Professor Junger was talking about because that wasn't what we intended when we enacted the statute. I know that. I was here when we did it.

Senator MCCLURE. Mr. Chairman, I ask unanimous consent that a statement by Senator Nickles be inserted following your statement at the opening of the hearing.

The CHAIRMAN. Yes, without objection.

Well, thanks to all witnesses.

Well, wait a minute. First of all, I understand Mr. Turner has spent over $100,000 in legal fees to date. Is that correct?

Mr. TURNER. That is correct.

The CHAIRMAN. So, that is a pretty good fine right there in itself.

Well, thanks to all witnesses. The hearing is adjourned.

[Whereupon, at 12 p.m., the hearing was adjourned.]

APPENDIX

RESPONSES TO ADDITIONAL QUESTIONS

Department of Energy
Washington, DC 20585

FEB 04 1988

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are responses to the questions included in your letter of December 3, 1987.

If I can be of further assistance, please let me know.

Sincerely,

C. L. van Orman

Chandler L. van Orman
Deputy Administrator
Economic Regulatory Administration

Enclosures

cc: Honorable James A. McClure
Ranking Minority Member

Celebrating the U.S. Constitution Bicentennial — 1787-1987

1. Q. How many pending oil overcharge cases is DOE pursuing using the "central figure" theory? Please provide a list of those cases, docket numbers, dates filed, and current status.

   A. Currently, there are 36 oil overcharge cases pending in which DOE is asserting the "central figure" theory to impose personal liability for regulatory overcharges. A list is attached (Exh. 1).

2. Q. How many oil overcharge cases prosecuted using the "central figure" theory have been completed and are no longer subject to appeal, due either to settlement or exhaustion of administrative or judicial remedies? Please provide a list of those cases, docket numbers, and dates and nature of final disposition.

   A. Thirty-three oil overcharge cases using the central figure theory have been completed and are no longer subjec to appeal. A list is attached (Exh. 2).

3. Q. In how many oil overcharge cases to date has the government sought restitution under section 209 of the ESA using theories other than the "central figure" theory? Please provide the case names and numbers, theories employed, status, and disposition of each matter, specifying the theories accepted by the court in each successful prosecution.

   A. The government has sought restitution from individuals under section 209 of the ESA using theories other than the central figure theory in 39 cases. A list is attached (Exh. 3). Note: Due to the fact that the government often sought penalties for the same conduct for which it was also seeking restitution, there may be considerable overlap between Question 3 and Questions 4 and 5.

4. Q. How many pending or completed oil overcharge cases have been prosecuted under the civil and/or criminal penalties sections of the ESA, as amended? Please list the case names, docket numbers and status for each category.

A. Civil Penalties

In 1,856 enforcement cases resolved prior to litigation, the settlement contained an amount in compromise of civil penalties. Exhibit 4-1 attached hereto consists of a computer printout of such cases; civil penalty amounts appear as "settlement type 5." Exhibit 4-2 contains a supplemental list of civil penalty settlements.

ERA often has sought civil penalties in the complaints and counterclaims it has filed in judicial proceedings. There does not exist a comprehensive list of affirmative court actions in which civil penalties were sought. Exhibit 4-3, however, reflects a partial listing compiled from reported decisions.

In addition, ERA generally includes a recommendation of civil penalties in its memoranda of referral to the Department of Justice for the initiation of court actions to enforce final agency orders (Remedial Orders and Consent Orders). Exhibit 4-4 contains a listing of civil referrals generated from ERA's current data base. Information concerning earlier civil referrals, which are not included in the data base, could not be readily retrieved; those cases were previously declined by the Department of Justice,

resolved by settlement, or finally adjudicated. The data base also does not include any cases in which firms are in noncompliance and memoranda of referral are in preparation. See also Exhibit 4-5 discussed below.

Criminal Penalties

When ERA believes that a particular case may warrant criminal penalties, a referral to the Department of Justice is made with a recommendation that DOJ conduct a criminal investigation and, where DOJ deems appropriate, prosecute corporate entities and/or individuals.

Exhibit 4-5 is a list of all ERA criminal referrals in which ERA's files reflect a prosecutive action by DOJ. Exhibit 4-5 also reflects the criminal disposition, to the extent that we were advised by DOJ, in oil price control prosecutions. This includes, where available, sentencing information (criminal fines and/or imprisonment), as well as corresponding civil dispositions and the payment of any civil penalties made in conjunction with, or arising primarily as a result of, those criminal pleas or convictions. The detail of such information may vary depending on the extent it was available from ERA's criminal referral files.

The DOE regards as privileged and confidential the information contained in Exhibit 4-4 concerning the identity of individuals and status of pending cases. Since its public release could violate important privacy interests or jeopardize pending litigation, DOE requests that you take

appropriate precautions to protect this information from public disclosure.

Note: Due to the fact that the government often sought penalties for the same conduct for which it was also seeking restitution, there may be considerable overlap between Question 3 and Questions 4 and 5.

5. Q. Please list the case names, docket numbers, and dispositions of all past and present government prosecutions for oil overcharges under 15 U.S.C. section 754(a)(4).

A. ERA has treated this question as being subsumed by Question 4 and has included criminal and civil disposition of all past and present government prosecutions under both the ESA and 15 U.S.C. Section 754(a)(4) in its answer to Question 4 and exhibits attached thereto.

6. Q. How many civil suits under section 210 of the ESA are pending? Please list the cases, docket numbers, amounts of damages sought, and status.

A. Section 210 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note, provides for a private cause of action to recover overcharges in excess of the applicable price regulations. The Department of Energy is generally not a party in these actions, nor is there any procedure for information about these private cases to be reported to the Department. We have obtained the following data from the Administrative Office of the U.S. Courts: as of September 30, 1987, there are 11 civil suits pending under Section 210 of the ESA; they are listed in Exhibit 6.

7. Q. How many civil suits filed pursuant to section 210 of the ESA resulted in judgments against violators or money settlements? Please list these cases, docket numbers, disposition, damages requested, and damages awarded.

A. Section 210 of the Economic Stabilization Act of 1970 (ESA), 12 U.S.C. § 1904 note, provides for a private cause of action to recover overcharges in excess of the applicable price regulations. The Department of Energy is generally not a party in these actions, nor is there any procedure for information about these private cases to be reported to the Department.

However, section 210 cases with opinions released by the courts for publication can be accessed through computerized legal information systems. Two searches performed on Lexis identified a potential group of nearly 150 such cases. These cases were evaluated with respect to the factors requested in Question 7, and of the 150, apparently 9 resulted in judgments against the violator.

More than 40 cases cited section 210 of the ESA but were not actions for damages under 210. Another five cases were 210 actions but for injunctive relief only. An additional 22 cases were rulings on procedural matters and provided minimal detail about the damages requested under section 210 or the disposition of the case.

In 13 cases the suit was held barred by the applicable statute of limitations. At least six cases were remanded for further action but did not result in any further written opinions, while six other cases were subsequent decisions in cases already reviewed but which did not contain the information requested in Question 7.

In 32 decisions, the plaintiff's case was terminated for various reasons: the defendant was granted summary

judgment; the complaint was dismissed for lack of standing; the plaintiff lost on the merits; the case was stayed pending DOE action under primary jurisdiction; and plaintiff's claims were dismissed for reasons such as failure to allege willfulness. In four cases the defendant's motion for summary judgment or to dismiss was denied. While those cases were to proceed, there were no subsequent decisions available to provide details of the outcome.

The remaining decisions that were reviewed are for judgments against violators or are responsive, at least in part, to the information requested in Question 7.

In Powerine Oil Co. v. The City of Long Beach, 745 F.2d 73 (TECA 1984) (Docket No. 9-84), the district court entered judgment for the plaintiff for overcharges in the amount of $205,346.21, and TECA affirmed.

The final outcome in Gulf Oil Corp. v. Dyke, 734 F.2d 797 (TECA), cert. denied, 469 U.S. 852 (1984) (Docket Nos. 9-80; 9-81), a case in which overcharges in the amount of $2,799,555.22 had been awarded against Gulf, is not known as the case was remanded to re-open the trial on the class-of-purchaser issue. The trial court had also awarded prejudgment interest in the amount of $1,166,629.06 and attorneys' fees of $750,000.00, but those portions of the award were reversed by TECA.

In Eastern Air Lines, Inc. v. Atlantic Richfield Company, 712 F.2d 1402 (TECA), cert. denied, 464 U.S. 915

(1983) (Docket Nos. 11-2; 11-3), the airline had sought $946,108.00 in overcharge damages. The district court awarded Eastern $179,160.00 and TECA affirmed.

The jury in Rossi v. Mobil Oil Corp., 710 F.2d 821 (TECA 1983) (Docket Nos. 9-65; 9-67), awarded the plaintiff $162,000.00 in damages. On appeal the plaintiff argued that the district court should also have awarded treble damages and attorney fees, but TECA affirmed the decision of the district court.

In McWhirter Distributing Co. v. Texaco, Inc., 668 F.2d 511 (TECA 1981) (Docket Nos. 9-49; 9-50), the district court had granted summary judgment to the defendant, Texaco. However, TECA found that there was an issue of material fact outstanding and remanded the case for further proceedings. Neither the dollar figures involved nor the outcome of the case is known.

TECA affirmed the district court award to Shell of $617,308.98 in damages in Shell Oil Co. v. Nelson Oil Co., Inc., 627 F.2d 228 (TECA 1980), and the Supreme Court denied certiorari, 449 U.S. 1022 (1980) (Docket No. 9-47).

In an overcharge claim against the federal government in the amount of $2,390,140.41, the district court found the United States had waived sovereign immunity in section 210 cases. Wyoming Refining Co. v. Department of the Interior, 547 F. Supp. 297 (D. Wyo. 1982) (Docket No. C81-0376B). The lawsuit was settled by the government prior to TECA's ruling in Lunday-Thagard Co. v. Department of the Interior, 773

F.2d 322 (TECA 1985), that the government had not waived sovereign immunity under section 210 of the ESA. 773 F.2d at 325 n.2. We have requested information from other agencies regarding possible section 210 actions, and we will provide it as soon as we are able.

Specific dollar figures are not available for damages claimed in Naph-Sol Refining Co. v. Cities Service Oil Co., 495 F. Supp. 882 (W.D. Mich. 1980) (Docket No. G76-451 C.A.). However, the district court did grant partial summary judgment for the plaintiff, finding that Cities had violated the price regulations. The case was scheduled for a jury trial on the amount of the overcharges and on the issue of treble damages, but there is no reported decision relating the outcome.

The final 210 case for discussion is Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 420 F. Supp. 162 (S.D. Ala. 1976) (Docket No. 75-483-P). Originally, Citronelle-Mobile brought a diversity breach of contract action against Gulf. Gulf counterclaimed for a refund of overcharges under section 210 in the amount of $558,583.95. The district court concluded that Congress intended the price control law and regulations to be in effect during the gap in time that had occurred between the expiration of the EPAA on August 31, 1975 and its reinstatement on September 29, 1975. Therefore, the court held that Gulf was entitled to a refund from Citronelle-Mobile for a total of $501,077.89.

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The constitutionality of the retroactive application of the legislation to cover the lapse in price controls was litigated unsuccessfully by Citronelle-Mobile over the next three years. Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 578 F. 2d 1149 (5th Cir. 1978); Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp., 591 F.2d 711 (TECA 1979), cert. denied, 444 U.S. 879 (1979). The net result was that the judgment on Gulf's 210 counterclaim against Citronelle-Mobile for $501,077.89 remained in effect.

8. Q. Has DOE's Office of Hearings and Appeals (OHA), any other unit of DOE, or any court overruled the agency's determination in RFB Petroleum, Inc., (Case No. HRZ-0159), 12 DOE paragraph 82,528 (1984) that violations of DOE regulations are not traditional torts?

A. OHA made the statement that "violations of DOE regulations are not traditional torts" in Economic Regulatory Administration (RFB Petroleum, Inc.), 12 DOE ¶ 82,529 at 85,136 n.6 (1984). It should be noted that this statement is dicta without discussion or support, in a footnote, in an interlocutory decision.

We know of no decision by OHA, other units of DOE, or the courts that overrules, follows, or discusses the quoted statement in 12 DOE at 85,136 n.6.

It is clear, on the other hand, that OHA has departed from the view expressed in the footnote of which the quoted statement is a part. In that footnote, OHA tentatively opined that while personal liability clearly attached to

willful or knowing tortious misconduct, it was "far from clear" whether such liability attached to non-willful conduct in violation of DOE regulations. (It was in this context that OHA noted that "violations of DOE regulations are not traditional torts.") OHA expressly reserved judgment on the matter at that time. Id.

OHA later ruled, in the same case on the merits, RFB Petroleum, Inc., 14 DOE ¶ 83,048 (1986), that personal liability as a central figure in conduct which violates the regulations may attach in connection with DOE regulations regardless of whether the conduct was willful or non-willful. OHA has consistently maintained this view. See cases cited in response to Questions 1 and 2, supra.

ERA is also aware of court cases which, while not in any sense "overruling" the quoted statement in 12 DOE at 85,136 n.6, nevertheless plainly reject any suggestion that there can be no torts other than "traditional" torts or that there can be no "regulatory" torts. For example, in Kardon v. National Gypsum Co., 69 F. Supp. 512, 513 (E.D. Pa. 1946), quoted with approval in Kerber v. Kakos, 383 F. Supp. 625, 627 (N.D. Ill. 1974), the court flatly stated that "[t]he disregard of the command of a statute is a wrongful act and a tort." The Supreme Court similarly stated, in

Texas & Pacific Ry. v. Rigsby, 241 U.S. 33, 39 (1961), that "disregard of the command of a statute is a wrongful act" that can give rise to to the same types of liability as a common-law tort.

9. Q. Please provide and explain DOE's legal arguments distinguishing the Citronelle-Mobile cases from Johnson Oil Co. v. DOE, 690 F.2d 191 (TECA 1982).

A. The Government's legal arguments distinguishing Citronelle from Johnson Oil are set forth in the attached briefs, which were filed in the Citronelle case:

Exhibit 9-1 Brief for the Appellants (at 33 n.34)

Exhibit 9-2 Government Parties' Principal Brief as Cross-Appellees and Reply Brief as Appellants (at 29 n.32)

In its May 7, 1987, decision, the Temporary Emergency Court of Appeals found that Johnson Oil was not dispositive of the individual liability issue in the Citronelle case. Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16, 24 (Temp. Emer. Ct. App.), cert. denied, 108 S. Ct. 327 (1987) (attached hereto as Exhibit 9-3). These briefs, and the decision which accepted their arguments, present the government's position for the public record and are self-explanatory.

10. Q. Was DOE's decision to proceed against the individual in Citronelle predicated on the grounds of administrative convenience? Please explain the particular circumstances of administrative convenience in Citronelle leading to that determination.

A. The decision was made in the course of the litigation

after consultation between lawyers at the Department of Justice and lawyers at the Department of Energy because the government lawyers believed there were valid legal arguments in support of personal liability in light of all the circumstances. The government remains in litigation with Citronelle and Mr. Chamberlain, and it would be improper to answer a question implicating the reasons for an exercise of the government's enforcement discretion when there is pending litigation arising from that exercise.

DOE can state in general that the decision to proceed against individuals in oil overcharge cases involves consideration of a number of factors, including, among other factors, the nature of the evidence of individual involvement, the financial condition of respondent corporations, administrative convenience and burden, and other similar considerations.

11. Q. Was there a determination by any unit of DOE that an administrative burden would be placed on the agency in seeking refunds from the Citronelle corporations rather than seeking restitutionary refunds from the individual, Chamberlain? If so, please explain the grounds for that determination in detail.

A. See response to question No. 10.

12. Q. Was the decision to seek restitution from the individual Chamberlain based on a determination that such course of action was necessary for effective enforcement? Please explain in detail.

A. See response to question No. 10.

13. Q. In the violations litigated in U.S. v. Exxon Corp., 773 F.2d 1240 (TECA 1985), did the government seek restitution of overcharges from any officer, employee or agent of Exxon Corporation who participated in, or was an animating force in decisions that led to Exxon's violations? Please explain why or why not.

A. The government did not, in any pleadings or other formal request, seek restitution of the overcharges on sales of crude oil from the Hawkins Field Unit from any officer, employee or agent of Exxon Corporation.

For a discussion of the considerations which generally affect the government's actions regarding the parties from whom to seek restitution, see the response to Question 10.

14. Q. Did the government seek prosecution of any person under 15 U.S.C. section 754(a)(4) in the above referenced Exxon case? Please explain why or why not.

A. The government did not seek penalties as specified by the referenced section against individual directors, officers, or agents of Exxon for "knowingly and willfully authoriz[ing], order[ing], or perform[ing] any of the acts or practices constituting in whole or in part a violation . . . . "

See the response to Question 10.

15. Q. In U.S. v. Sutton, 795 F.2d 1040 (TECA 1986), and the cases below, did the government seek civil penalties under the ESA? If not, please explain. If so, please provide the specifics of those allegations and their disposition.

A. In its original complaint in Sutton, which was filed on November 9, 1982, the United States did request civil penalties under § 5(a)(4) of the EPAA, in addition to restitution. However, prior to trial, the United States deleted several counts. The counts deleted included alleged violations of DOE reporting and recordkeeping requirements, and the count for civil penalties. We understand these non-restitutionary counts were deleted upon review of

litigation factors and considerations such as those enumerated in the response to Question 10. In addition, an award against Sutton for civil penalties (unlike an award for restitution) likely would be a subordinated claim in bankruptcy (see 11 U.S.C. § 726(a)(4)) in the event -- which in fact occurred just before trial -- that Sutton and his corporations ever declared bankruptcy.

16. Q. In Sutton, what were the individual's wrongful acts as alleged by the government as grounds for personal liability under section 209 of the ESA?

A. As the district (trial) court agreed, and as affirmed on appeal by the TECA (the Supreme Court denied certiorari), the government asserted that Sutton and his defendant corporations jointly committed all of the illegal miscertifications upon which the government's case was based. Miscertification of crude oil expressly violates 10 C.F.R. § 212.131. The government alleged, and the courts all agreed, that Robert B. Sutton should be held personally liable, jointly and severally with his corporations, under both the "piercing the corporate veil" theory and the tortious conduct theory. The government asserted and successfully proved that Sutton was the central figure in defendants' crude oil miscertification scheme. He conceived it, negotiated the basic arrangement with the crude reseller firms which provided paper title to the "old oil" -- lower and upper tier oil which Sutton then miscertified as stripper and resold to the source firms and others -- , participated in transactions, set the guidelines for his

traders, and always personally controlled the tiers to be traded.

17. Q. In Sutton, what various theories of liability under section 209 of the ESA did the government propose? Which theories did the courts uphold?

A. The United States initiated the case on November 9, 1982, by filing a complaint alleging that defendants had violated DOE regulations by miscertifying or failing to certify approximately 177 million barrels of crude oil, resulting in a violation of over $700 million plus interest. The theories of liability advanced by the government were (as discussed in the answer to Question 16 preceding): (1) restitution of illegal overcharges, and (with respect to personal liability only) (2) piercing the corporate veil, and (3) tortious conduct. After a trial and post-trial briefing, the district court on August 22, 1984, entered 106 findings of fact and 29 conclusions of law, holding that the defendants had violated the regulations throughout the audit period. The Court further found that Robert Sutton personally engaged in and directed this systematic miscertification scheme. The court held that the veils of the defendant corporations should be pierced and that Sutton had engaged in tortious conduct.

On September 14, 1984, the court entered judgment against all defendants jointly and severally for $424,903,326.50 in restitution to be paid to the United States for distribution to the states for use in energy-related programs. TECA affirmed the decision,

including both theories of liability, on June 11, 1986, 795 F.2d 1040, and the Supreme Court denied certiorari on January 12, 1987, 107 S. Ct. 873.

18. Q. Since the government initiated prosecutions under its oil overcharge program, in how many cases has it attempted to pierce the corporate veil? Please list the cases, docket numbers, status, and disposition of each case, along with statement of whether the court and/or hearing officer adopted the government's "piercing the veil" request.

A. The government has attempted to pierce the corporate veil in 26 cases. A list is attached (Exh. 18).

19. Q. In what ways were the violations of regulations alleged and found in Citronelle-Mobile different from the regulatory violations litigated in Johnson Oil Co. v. DOE, 690 F.2d 191 (TECA 1982)? Please explain in detail.

A. The department is not in a position to answer this question because, contrary to the suggestion arising from the appearance of DOE in the caption of the case, the department did not assert any claim against Johnson Oil or the Johnsons individually, nor did the department express a position in the litigation regarding any theory of liability asserted by the claimants. Although "DOE" remained in the caption of the case, DOE was dismissed as a party before trial in the district court.

Johnson Oil was a private action in which the plaintiffs claimed personal liability under the department's regulatory definition of "firm," not under a theory of tortious conduct. The case was not based on a departmental audit and investigation, and the department had no hand in developing the record. Accordingly, we cannot say whether such a theory might have been presented by the evidence,

and we cannot say what the factual differences between the parties' conduct might have been. As the court of appeals acknowledged, the theory of tortious conduct, among others, simply had not been presented by the private plaintiffs (Johnson Oil, 690 F.2d at 203).

20. Q. In the government's brief in opposition to a petition for writ of certiorari to TECA in Chamberlain, et al. v. U.S., No. 87-140, reference is made generally to section 874A of the Restatement (Second) of Torts (1979), and specifically to section 874A comment g as definitive proof that violations of statutes and regulations are universally considered tortious conduct. Are there not numerous citations to cases in comment g where the courts refused to find tortious conduct or refused to allow a remedy sounding in tort?

A. Question 20 characterizes the government's reference to section 874A comment g in its brief opposing certiorari in Chamberlain as asserting "definitive proof" that violations of statutes and regulations are universally considered tortious conduct. However, the government's brief cited comment g for an entirely different point, namely, that "it is hornbook law that 'the power to authorize damages or injunctive relief . . . for the vindication of a federal . . . statutory right . . . exists inherently in the courts.'" Brief at 10.

There are in comment g citations to 8 cases in which the courts have decided that Congress did not intend to create a private right of action for violations of specific statutory provisions.

The government cites to comment f, not comment g, in its its brief with respect to the treatment of violations of

statutes and regulations as tortious conduct. "Specifically, violation of price-control statutes is literally a textbook example of tortious conduct (id. § 874A comment f, illustration 11)." Illustration 11 under comment f is such an example where a federal housing act that prohibits certain rental overcharges can give rise to a civil action to recover the overcharge.

21. Q. If your answer to [Question 20] is yes, please distinguish each case cited in the comment [g] where a violation of a statute or regulation did not give rise to an action for damages from DOE's position concerning regulatory violations in oil overcharge cases.

A. In the cases cited in comment g, unlike the oil overcharge cases prosecuted by DOE, there is no statutory provision expressly authorizing the party initiating the litigation to obtain a judicial remedy for violation of the statute. Among the cases cited in section 874A comment g are 8 in which the courts found that conduct violating a legislative provision did not give rise to a private action for damages. The primary distinction between those cases and DOE's position concerning regulatory violators is that the former are nearly all private actions for damages. The DOE, on the other hand, is expressly authorized by ESA section 209 to vindicate the public interest by seeking restitution for price overcharges under the federal regulations.

Cort v. Ash, 422 U.S. 66 (1975), involved the federal elections law. A corporate stockholder sought to sue the corporate directors for damages under a criminal statute

prohibiting certain corporate contributions or expenditures in presidential and vice-presidential elections. The Court concluded that such a private cause of action was not contemplated by the legislation nor required to fulfill Congress' purposes in enacting the statute. Furthermore, the statute by its terms was criminal only. The Court noted that while a criminal penalty did not preclude a private cause of action, there must be some statutory basis for inferring the civil cause of action.

In Piper v. Chris-Craft Industries, Inc., 430 U.S. 1 (1977), the Court cited Cort v. Ash and ruled that the plaintiff was not within the class of intended beneficiaries under the applicable federal securities legislation. The Court said that a private cause of action can be implied in favor of a particular class intended to be protected even though the statute's relevant provisions are silent on remedies. However, in the case before the Court, the plaintiff lacked standing to bring the action.

In another securities case, Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975), the Court held that customers of failing broker-dealers have no right of action under the Securities Investor Protection Act of 1970 to compel the Securities Investor Protection Corporation to act for their benefit. The standard applied by the Court was that any

Mortgage Advisers, Inc. v. Lewis, 441 U.S. 11 (1979), the Court stated that its primary duty was to determine through statutory construction whether Congress intended a private cause of action to lie under the statute. The absence of any provision did not rule out the possibility, for such an intent could appear in the language or structure of the statute, or in the circumstances of its enactment. In Transamerica the Court found that an action to void the investment adviser's contract could be maintained, but not claims for damages and other monetary relief. To allow claims for damages would require that monetary liability to a private plaintiff be read into the statute, and what evidence there was of congressional intent on this subject did not support such a finding.

In Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1 (1981), the Court found that Congress had expressly provided for certain governmental and private rights of action and that no additional private rights would be implied under the Federal Water Pollution Control Act and the Marine Protection, Research, and Sanctuaries Act.

Finally, the Supreme Court found that no private right of action was implied on behalf of those claiming injury because of a violation of the Rivers and Harbors Appropriation Act in California v. Sierra Club, 451 U.S. 287 (1981).

In the cases from comment g discussed above, for the

cause of action not otherwise authorized by the statute must be consistent with the legislative intent and with the effectuation of the purposes served by the statute. The Court carefully examined the legislative history and concluded that Congress never intended to allow such an action as the customers of the failing broker-dealer sought to bring. In fact, the structure and purpose of the act were incompatible with any such implied right of action.

In another case cited under comment g of section 874A, Chrysler Corp. v. Brown, 441 U.S. 281 (1979), a government contractor sought to enjoin disclosure of its employment statistics. The Supreme Court held that neither the Freedom of Information Act nor the Trade Secrets Act afforded a private right of action to enjoin disclosure.

The trustee in the litigation of a failed broker-dealer brought an action for damages against an accounting firm in Touche Ross & Co. v. Redington, 442 U.S. 560 (1979), for an improper audit and certification of the broker-dealer's financial statements. The Court held that on the basis of the statutory language and legislative history of the particular section of the Securities and Exchange Act requiring broker-dealers to keep records and file reports, the act did not create a private cause of action.

In yet another investment industry case, the private plaintiff sought an injunction, recission of a contract and damages for various frauds and breaches of fiduciary duty in violation of the Investment Advisers Act. In Transamerica

most part the Court found that no private cause of action for a regulatory violation could be inferred from either the statute itself or from its legislative history. This is in direct contrast to section 209 of the ESA, which expressly authorizes the government to seek restitution of unlawful overcharges.

22. Q. In the above-referenced brief to the Supreme Court in Chamberlain, the government concludes that the regulatory violations in that case were tortious because it is appropriate to apply common law tort principles to seek damages for breach of new statutory duties not in existence during the time of the development of the common law of torts. Is a government action under section 209 of the ESA an action for damages? Please explain the government's understanding of the elements of an action for damages in the context of restitution.

A. A government action under section 209 of the ESA is not an action for damages, but one for restitution. The government's brief to the Supreme Court in Chamberlain, at pages 10-12, cites § 874 of the Restatement (Second) of Torts (1979) and several Supreme Court cases which state the general principle that courts may grant relief for tortious violations of federal statutes. While the cases cited involve situations where the relief determined to be appropriate was in the form of damages, the government's brief does not state or imply that damages is the only form of relief available for wrongful disregard of the command of a statute.

Damages and restitution are two distinct types of remedies. The objective of the damages remedy is to compensate for injuries caused by invasion of one's legal rights, while restitution seeks to restore the person who

has suffered loss to the position he formerly occupied. The two theories do not always lead to widely differing results. Indeed, in some instances, the measure of damages is the same as the measure of restitution. In some circumstances, damages may be the appropriate form of relief, but in others restitution is the most adequate remedy. In Chamberlain, the government sought a form of relief which section 209 of the ESA expressly provides as the appropriate remedy for violations of the statute:

> In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

23. Q. Would the refusal of a court to adopt the "central figure" theory to hold corporate officers, employees, or agents personally responsible for moneys received in violation of the oil pricing regulations under section 209 of the ESA shield them from civil liability where these persons are personally involved in or directly responsible for statutorily proscribed activity, as alluded to at page 13 of the above-referenced government brief to the Court in Chamberlain?

A. "Central figure" is simply another term of description referring to the role an individual may play in transactions which violate legal standards, in our case the price control regulations. DOE does not take it to mean anything different from what other terms, such as "tortious conduct," refer to.

24. Q. Is it DOE's legal interpretation that it is the policy of Congress for the government to seek restitution under section 209 of the ESA for moneys never received, as implied in the government's brief in Chamberlain? If yes, please give references in support of your answer.

A. As noted above, ESA section 209 expressly authorizes the

government to seek restitution of all moneys received in violation of the price controls. In enacting the Economic Stabilization Act Amendments of 1971, Congress made clear that courts have "the inherent equitable power . . . to set things right and order restitution." S. Rep. No. 92-507, 92nd Cong., 1st Sess., reprinted in 1971 U.S. Code Cong. & Admin. News 2283, 2291. Restitution is a remedy by which the defendant is made to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives. Sauder v. DOE, 648 F.2d 1341, 1348 (TECA 1981), citing 5 Moore's Federal Practice ¶ 38.24[1] at 38-195 (2d ed.). Thus, where the loss suffered is greater than the benefit received by the violator, the court has the equitable power to grant restitution to restore the status quo of those who have suffered the loss, even though that amount may be greater than the amount by which the violator has been enriched. E.g., Mosser v. Darrow, 341 U.S. 267, 275 (1951).

As discussed in detail by the Temporary Emergency Court of Appeals in Chamberlain and by the government in its brief to the Supreme Court in that case, where an individual is personally culpable for violations of the pricing regulations, he may be held personally liable for the full amount of the overcharges, even though that amount may exceed the amount of his direct enrichment. See TECA opinion at 19-21 and Government's Brief at 17-18.

In the words of Learned Hand, "it makes no practical difference whether the profit comes to defendants in the

form of a dividend or whether it merely enhances the value of their shares." Sheldon v. Metro-Goldwyn Picture Corp., 106 F.2d 45, 52 (2d Cir. 1939).

The approach taken by the government and TECA in Chamberlain is similar to the approach taken by the government in a case involving the FTC Act, Federal Trade Commission v. International Diamond Corp., 1983-2 Trade Cases ¶ 65,506 (N.D. Cal. 1983). There, the FTC brought suit against International Diamond Corporation and several of its individual officers for violations of the FTC Act in transactions in which consumers were allegedly defrauded. Denying the individual defendants' motion for partial summary judgment, the district court issued an opinion upholding the principle that an individual may be held liable in restitution for the conduct of a corporation which the individual controlled. Id. at 68,458-59.

In accordance with these recognized principles of restitution, under section 209 of the ESA, the government seeks to restore the status quo that existed prior to the violations of the price controls. The statute, which incorporates principles of restitution, requires violators in some instances to make restitution of amounts received by others.

25. Q. Can a corporate entity act without participation by persons who are corporate officers, employees, or agents? If yes, please explain in detail.

A. Generally speaking, a corporation cannot act without

some participation by natural persons. The participation of natural persons, however, does not necessarily constitute sufficient involvement to make each of them a "central figure" for purposes of liability.

26. Q. In U.S. v. Sexton Cove Estates, 526 F.2d 1293 (5th Cir. 1976) (distinguished from the facts in Citronelle in the government's brief opposing certiorari at page 13), did corporate officers, directors, employees, or agents participate in acts or decisions that led to the corporations's violations?

A. The 5th Circuit opinion in Sexton does not set forth any information concerning the conduct of Sexton corporate officials other than to state that "Oesterle was Sexton's President from 1970 to 1972, the time of the questioned activities," and that the Army Corps of Engineers directed certain correspondence to him in 1971. The district court opinion in the Sexton case, 389 F. Supp. 602 (S.D. Fla. 1975), does not mention any additional factual data about the activities of Sexton's president other than to note that he was one of three signatories to a contract for the supervision of Sexton's dredging and filling activities.

The government's brief opposing certiorari in Citronelle noted that the Temporary Emergency Court of Appeals had "correctly distinguished" Sexton Cove "as a case involving an attempt to impose 'derivative rather than personal' liability on corporate officers," and we do not agree that this is a factual distinction. In Sexton Cove, neither the district court nor the Fifth Circuit considered the tortious conduct theory or addressed the facts that might have made a difference under that theory.

27. Q. Please describe in detail alternative fact scenarios for Citronelle-Mobile where the officers', directors', agents', or employees' participation, decisions, or acts leading to corporate violations would merely be derivative, thus resulting solely in corporate liability under DOE's legal analysis of Sexton Cove.

A. In Sexton Cove, the government unsuccessfully attempted to hold a corporate official liable for the corporation's statutory violations on the theory of piercing the corporate veil. In Citronelle-Mobile, the government successfully argued that a corporate official was personally liable because of his own tortious conduct in connection with regulatory violations. Each case was decided on a whole complement of factors particular to that case.

It would be total speculation for DOE to fashion alternate scenarios as requested in this question, since Sexton Cove did not consider the tortious conduct theory. It may well be that under that theory there would have been liability under the facts of Sexton Cove. In addition, it does not appear that Mr. Chamberlain's liability was based on an aggregation of factors as is sometimes the case with "piercing," but rather on the undisputed central role he played in conceiving and executing the violative transactions. Accordingly his liability would apparently not be different under any scenario in which he remained the central actor.

28. Q. Does the Restatement of Restitution (1937) distinguish between a tort and an equitable wrong? If so, please explain in detail DOE's legal understanding of those differences.

A. The Restatement of Restitution (1937) does not distinguish between a tort and an "equitable wrong" in terms of how the measure of restitution is determined. The Restatement treats a number of different situations which give rise to the remedy of restitution. Chapter 2 discusses restitution of benefits conferred by mistake, including mistake resulting from fraud. Chapter 3 deals with restitution of benefits acquired by coercion. Chapter 4 treats restitution of benefits conferred under a contract. Chapter 5 deals with restitution of benefits voluntarily conferred without mistake, coercion, or request. Chapter 6 discusses restitution of benefits lawfully acquired which are not conferred by the person claiming restitution. Chapter 7 discusses restitution of benefits tortiously acquired.

The Restatement covers, in these various chapters, those situations in which the person from whom restitution is sought has acquired benefits through conduct that was wrongful as to the plaintiff. Wrongful conduct giving rise to the right to restitution may be conduct recognized at common law as a tort, or it may be what Professor Palmer has called an "equitable wrong, such as breach of trust or other fiduciary obligation." See 1 G. Palmer, supra, § 2.1, at 50. Discussion of restitution based on wrongful conduct which may be called "equitable wrongs" is found in various

chapters of the Restatement, including the chapter devoted to torts. Thus, it does not appear that the Restatement distinguishes wrongful conduct that constitutes a traditional tort from other types of wrongful conduct which give rise to the right to restitution.

That an obligation to make restitution may arise out of tortious conduct is a generally recognized legal principle. Chapter 7 of the Restatement of Restitution (1937) is entirely devoted to the subject of restitutionary actions arising from tortious conduct. See also I. G. Palmer, The Law of Restitution, Chapter 2 (1978), which discusses restitution arising from tort and equitable wrong; D. Dobbs, Handbook on the Law of Remedies: Damages - Equity - Restitution, §§ 5.9, 5.15, 39.4 (1973); J. O'Connell, Remedies in a Nutshell (1977). Conduct may be tortious even though the duty breached by that conduct is one imposed by statute rather than the common law.

29. Q. Please supply a legal opinion of the General Counsel of DOE explaining in detail the agency's understanding of restitution in the context of section 209 of the ESA. Please include a discussion of any aspects of restitution under section 209 that deviate from the common law of restitution.

A. The legal opinion of the General Counsel on this matter was rendered in Ruling 1984-1, and has been articulated in the pleadings filed with the courts in proceedings where this issue has arisen. A copy of that Ruling (Exh. 29), together with samples of those pleadings (Exh. 9-1, 9-2), are attached.

30. Q. In the Citronelle-Mobile cases, some of the government's briefs rely on the Restatement of Restitution section 1, comment e (1937), as grounds to hold the central figure responsible for restitution under section 209 of the ESA although he "had not in fact been enriched thereby".

Isn't that statement concerned solely with situations in which there has been a transfer of goods or services from plaintiff to defendant? Isn't the sole restitutionary principle explained by examples in comment e that the measure of recovery in a restitution action is the fair market value of the goods or services? If your answers to either part of this question are in the negative, please explain in detail DOE's legal reasoning differing from the above-stated narrow interpretation.

A. The TECA opinion in Citronelle cited the referenced passage from the Restatement for the broad proposition. 826 F.2d at 27. The position of the government on the cited passage of the Restatement is expressed in the briefs filed by the government on that issue in Citronelle, and adopted by TECA. See Exhibits 9-1 and 9-2.

31. Q. In Cougar Oil Marketers, et al, No. HRO-0262, issued since the TECA decision in Citronelle-Mobile, DOE states

> Cougar's attempt to invoke the doctrine of immunity for corporate officers and shareholders on behalf of Sanborn clearly is outweighed by the equities favoring enforcement of the DOE regulations and full restitution to the public which bore the burden of Cougar's overcharges.... We find that the state and federal government's joint interest in providing for restitution clearly outweighs whatever state interest may exist regarding the application of state corporate law.

Cougar, slip op. at 24-25. Does this holding reflect a change in DOE policy? If so, please explain the change and any support for the change in detail. If not, please explain in detail why this holding does not represent any change.

A. Immediately following the quoted passage from Cougar Oil Marketers, Inc., 16 DOE ¶83,008 at 86,053 (1987), OHA cites as authority the following cases: Osborne Energy Corp., 14 DOE ¶83,013 at 86,096 (1986); Doma Corp., 13 DOE ¶83,027 at 86,239 (1985); and PetroTech Trading Co., 11 DOE

¶84,055 at 87,403-04 (1984). The statutory bases for this position, and the judicial and other authorities supporting it, are set forth in the above-cited decision. OHA's position in this respect is also reiterated in the other cases involving personal liability based on "central figure in tortious conduct," cited in respect to Questions 1 and 2, in which OHA has rendered a decision. See also the responses to Questions 32 and 33.

32. Q. Whether DOE considers the policy quoted above as new or continuing, is it grounded in any expression by Congress to change existing corporate case law? If yes, please reference your support and explain in detail. If no, please detail DOE's basis for outweighing and modifying corporate case law.

A. As reflected in OHA Remedial Order decisions on the matter at issue, OHA's position is not based on any specific congressional "expression to change existing corporate case law." Rather, those decisions are based on the view that pre-existing corporate case law provides a number of exceptions to the general rule by which corporate stockholders are immunized from personal liability for actions taken in the name of the corporation and that violations of DOE regulations fall within one or more of these established case-law exceptions.

As already noted, one of these exceptions is the "tortious conduct" basis of liability followed in the Citronelle case, which arises from the well-grounded rule of agency law that the agent is liable for his own wrongful actions whether or not within the scope of employment and regardless of whether the principal may also be liable.

This basic rule of accountability for one's own actions is not abrogated by the corporate form. The corporate "shield" was intended to protect corporate owners from suit based merely on their stock ownership, not to protect them from liability arising from their own misconduct as corporate officers or directors.

Another exception, or alternative theory for reaching the assets of corporate owners/officers for violations committed in the name of the corporation, arises from "piercing the corporate veil," discussed in the response to Question 18. This exception, also well grounded in the case law, rests on the view that the corporate fiction is appropriately disregarded when the corporation is used for fraudulent or other unlawful purposes.

Another exception, or alternative theory, was relied on in Cougar, among other cases. This exception, although perhaps of less ancient lineage in the case law than the other exceptions noted, nevertheless rests on clear judicial precedent and the constitutional principle of federal supremacy. Under this approach, sometimes known as "federal piercing," the fairly strict criteria for piercing the corporate veil normally applied are understood as having evolved in private debt, contract and tort actions under state law, where the need for preservation of the corporate form was often seen as more important than redress of private injury in a given case. These state "piercing" criteria need not be mechanically followed, according to

this view, where (as in the case of DOE enforcement actions for restitution) the government acts to enforce public rights under a federal statute. The strictness of state piercing law should be softened and tempered, if necessary, to achieve the presumptively paramount goals and purposes of federal law. Federal policies, in other words, are not to be thwarted or defeated merely because of state concern for protection of local corporate enterprises. E.g., Coca-Cola Co. v. International Telephone and Telegraph Corp., 201 U.S.P.Q. (BNA) 424, 429 (N.D. Ga. 1978); Bowater S.S. Co. v. Patterson, 303 F.2d 369, 372 (2d Cir.), cert. denied, 371 U.S. 860 (1962); Note, "Piercing The Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law," 95 Harv. L. Rev. 853 (1982). These cases and authorities, among a number of others, were cited by OHA in its decision in this matter in the PetroTech case, cited in the response to Question 31.

33. Q. With respect to any legislation governing DOE's oil overcharges program, please list and explain in detail DOE's understanding of any provisions that have changed existing case law relating to the individual responsibility of corporate directors, officers, or agents for violations of those corporations.

A. In Johnson Oil and Citronelle, TECA stated that Congress did not intend to affect principles of liability of corporate officers when it enacted the various price control statutes, but that individual liability could be based upon such established common law doctrines as piercing the corporate veil and tortious conduct. In enforcement proceedings for restitution of overcharges, ERA relies upon

these traditional doctrines in asserting individual liability; and, in result, both the administrative and judicial adjudications concerning individual liability in oil overcharge cases have been fully consistent with these principles.

Department of Energy
Washington, DC 20585

May 18, 1988

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D. C. 20510

Dear Mr. Chairman:

As Under Secretary Salgado indicated in his letter to you of March 18, 1988, Secretary Herrington has asked that I conduct the review requested in your letter of February 23, 1988, of the legal issues presented by the theory of individual liability relied upon by the Temporary Emergency Court of Appeals in the case of Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (Temp. Emer. Ct. App.), cert. denied sub nom., Chamberlain v. United States, 108 S. Ct. 327 (1987).

Preface

Because of the distinctive nature of a review of the law of a given case after it has been finally decided by the Judiciary, some initial observations may be helpful in understanding the context in which this review occurs. First, this case began many years ago as litigation brought by Mr. Chamberlain and Citronelle against the government, and both its defense and the litigation of the counterclaims that ultimately gave rise to the final decision from their outset have been handled primarily by the Department of Justice. Although there have been other lawsuits arising under the petroleum regulatory program in which attorneys from this Department have exercised primary authority in the conduct of litigation pursuant to a memorandum of understanding with the Department of Justice, this was not one of those cases. Second, consistent with your request, this review has been an "independent" one, in which neither the Department of Justice nor the Economic Regulatory Administration has been requested to contribute significantly to nor to concur with the analysis contained in this review. Thus the views expressed in this review do not necessarily constitute an institutional view of the

legal principles it addresses such as one would ordinarily attribute to formally-rendered opinions or interpretations.

Questions Presented

From the exposition contained in your letter of February 23, as well as the points made in the correspondence it attached from Professors Palmer and Junger, we would describe the questions as:

1. Whether the "central figure" theory enunciated by the Temporary Emergency Court of Appeals in Citronelle-Mobile represented a novel departure by that court from conventional legal norms in imposition of individual liability for funds received by others;

2. Whether sections 209 and 210 of the Economic Stabilization Act of 1970, incorporated in the Emergency Petroleum Allocation Act of 1973, as properly interpreted limit the ability of a court to order restitution by a defendant of amounts of a violation exceeding the sums actually received by that defendant; and

3. Whether individual liability predicated on the "central figure" theory on facts such as those presented by this case is so at odds with the common law of restitution as to make such a remedy clearly beyond the scope contemplated by Congress when it expressly authorized the remedy of restitution in 1971, and when it reaffirmed in 1975 that the Emergency Petroleum Allocation Act was not intended to change "existing case law relating to the individual responsibility of corporate directors, officers or agents for [corporate] violations* * * ."

I.

Examining the first question requires at the outset looking to whether the decision in Citronelle-Mobile represented a marked departure by TECA from its prior case law. That inquiry reveals that several of the precise questions presented in Citronelle-Mobile had been decided by TECA in Sauder v. DOE, 648 F.2d 1341 (Temp. Emer. Ct. App. 1981). In Sauder, the operator and part owner of three oil leases had received an administrative order to make restitution of the entire amount of overcharges arising from sales of crude oil from the properties whose production he managed, even though he himself had received only a portion of

the overcharges. On review of the record stemming from the administrative proceeding and the challenge to it that had been decided in the district court below, TECA concluded that it was proper to impose such liability because Sauder had been the "animating force" behind the venture and had "caused the overcharges." 648 F.2d at 1347. Moreover, TECA concluded that "hold[ing] the central figure responsible for refunding the overcharges is necessary to effective enforcement." 648 F.2d at 1348, citing Tenneco Oil Co. v. FPC, 442 F.2d 489, 497 (5th Cir. 1971).

In arriving at this conclusion, TECA considered and rejected the arguments that both the plain text of section 209 of the Economic Stabilization Act and the common law of restitution would "not permit the court * * * to order an infringer to refund monies not actually received by that individual" and that both DOE and the court below had undertaken improperly "to read a damage remedy into the statute." 648 F.2d at 1348. Relying on a standard practitioner's treatise on federal law, TECA first observed that "'restitution is usually thought of as a remedy by which [a] defendant is made to disgorge illgotten gains or to restore the status quo, or to accomplish both objectives.'" 648 F.2d at 1348, quoting 5 Moore's Federal Practice ¶ 38.24[2] (emphasis supplied by the court). Thus an action in restitution could lie "although the [defendant] has not been in fact enriched thereby." TECA continued by characterizing the order directed to Sauder as seeking only "to restore the status quo" and "to set things right," and concluded that the reference to restitution in section 209 had been intended by the Congress only to settle any doubt of the availability to the courts of their inherent equitable powers "to set things right and order restitution," rather than "to limit the powers of the courts * * * to restitution or to a particularly strict interpretation of restitution." 648 F.2d at 1348.

Sauder is but one of several cases that foretold the elements of TECA's decision in Citronelle-Mobile. For example, in United States v. Sutton, 795 F.2d 1040 (Temp. Emer. Ct. App. 1986), cert. denied, 107 S. Ct. 873 (1987), the "central figure" theory was one of the bases invoked to hold a controlling shareholder and corporate officer liable to make full restitution of overcharges wrought by his corporation. Citing Sauder, TECA stated that "[a] person who is the 'animating force' for regulatory violations is fully liable even though he does not personally receive all benefits of his illegal activities." 795 F.2d at 1063. Similarly, in United States v. Exxon Corp., 773

F.2d 1240 (Temp. Emer. Ct. App. 1985), cert. denied, 474 U.S. 1105 (1986), an operator was held "responsible for all the overcharges under the rationale of Sauder." 773 F.2d at 1270.

The next element of this analysis may be directed to exploring whether this body of TECA case law itself comprises a novel departure from conventional legal norms enunciated by other courts dealing with analogous or comparable statutory and factual settings. In this connection, in Tenneco Oil Co. v. FPC, 442 F.2d 489 (5th Cir. 1971) -- a case relied upon in Sauder -- a holder of a certificate of public convenience to sell natural gas was held liable to make full restitution of all overcharges even though it had not received all the moneys in question. And in SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1308 (2d Cir.), cert. denied, 404 U.S. 1005 (1971), an individual who purveyed illegal stock tips was held liable "to make restitution for the profits derived by his tippees." Similarly, in Sheldon v. Metro-Goldwin Pictures Corp., 106 F.2d 45, 52 (2d Cir. 1939) (L. Hand, J.), aff'd, 309 U.S. 390 (1940), a parent corporation found liable in tort for statutory copyright infringement was required to make restitution of profits it had not received but that had been retained by its subsidiaries, on the grounds that the parent corporation was "in complete control" and that "it makes no practical difference whether the profit comes to the defendants in the form of a dividend or whether it merely enhances the value of their shares." Likewise in Mosser v. Darrow, 341 U.S. 267 (1951), a trustee was required to make restitution of profits that he allowed others wrongfully to receive.

As these cases suggest, federal courts have from time to time directed that restitution may be made by a party or an entity that had not in fact received the funds in question. The foregoing also bears on the suggestion that, in application of the "central figure" theory of liability in Citronelle-Mobile, TECA has improperly sanctioned an approach to enforcement that permits ignoring separate corporate existence despite the absence of facts, such as chronic failure to observe corporate formalities and commingling of corporate and private funds, that would be necessary to "pierce the corporate veil."

Judge Cardozo's opinion in Berkey v. Third Ave. Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926), cautioned about the "mists of metaphor" that labels like "piercing" might create. However, the federal courts have largely eschewed "corporate veil" technicalities, sometimes, for example, exhibiting preference for an "agency" analysis in cases in which parent corporations will be

liable for the acts of their wholly-owned subsidiaries when the operations of the subsidiaries are in fact conducted by officers of the parent corporation. See Pacific Can Co. v. Hewes, 95 F.2d 42, 46 (9th Cir. 1938) (imposing liability on the parent under an agency analysis while refraining from deciding the alternative "disregarding the corporate entity" theory suggested in Berkey). As it evolved, the approach of federal case law has been based on "recogniz[ing] [a] broader equitable principle that the doctrine of corporate entity * * * will not be regarded when to do so would work fraud or injustice * * * [or] is interposed to defeat legislative policies." First National City Bank v. Banco Para El Comercio, 462 U.S. 611, 629-630 (1983) (citations and quotation marks omitted); see, e.g., Lowen v. Tower Asset Management, Inc., 829 F.2d 1209, 1220-1221 (2d Cir. 1987) (apparently relying on both "central figure" and "piercing the veil" theories as bases for liability to make restitution under ERISA); United States v. Pollution Abatement Services, 763 F.2d 133, 135 (2d Cir.) (apparently relying on "central figure" theory as a basis for liability to make restitution under the Rivers and Harbors Appropriation Act of 1899), cert. denied sub nom. Miller v. United States, 474 U.S. 1037 (1985); Escude Cruz v. Ortho Pharmaceutical Corp., 619 F.2d 902, 907 (1st Cir. 1980) (describing the "general rule" followed in the federal courts as imposing personal liability on corporate officers whenever they have been "'the guiding spirit' behind the wrongful conduct * * * or the 'central figure' in the challenged corporate activity").

These cases indicate that TECA can neither be credited with nor faulted for any notable originality in its resort to the "central figure" theory of individual liability enunciated in Citronelle-Mobile. Clear federal case law precedent existed for looking to the dominant role of individual defendants in imposing liability effecting restitution to remedy torts found to result from particular transactions violating a statute, and for ordering restitution from defendants whose misconduct gave rise to the cause of action but who had not in fact received the funds. Even the label "central figure," for what it is worth, does not appear to be an original creation by TECA.

II.

The second question is presented by the text of the statute itself. As it was incorporated into the Emergency Petroleum Allocation Act of 1973, the relevant passage of section 209 of the Economic Stabilization Act of 1970, as that statute was

amended by the Economic Stabilization Act Amendments of 1971, reads as follows:

> Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation [promulgated by the administering agency]. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

Since at bottom this issue turns on a question of statutory construction, the obvious question here pertinent is whether, by its use of the words "of moneys received" with respect to the power of "restitution" described by section 209, Congress thereby intended to preclude the courts from employing restitution to order disgorgement of sums not actually received by a particular defendant, but received by others. As we have observed above, this precise contention was advanced in Sauder, but was rejected by TECA on the ground that enactment of section 209 was not intended to limit or curtail the equitable powers of the courts, but rather to declare the full measure of such powers' existence in deciding cases arising under the statute.

The circumstances prompting enactment of the Economic Stabilization Act Amendments of 1971 tend to buttress TECA's view. Those amendments were seen as necessary to assure a workable and effective machinery to implement and enforce the wage and price controls imposed by the President in 1971 under the Economic Stabilization Act as it was originally adopted. See S. Rep. No. 92-507, reprinted in 1971 U.S. Code Cong. & Admin. News 2283. By its terms, the power to order restitution was declarative and additive to the statute, as opposed to limiting that which the statute had previously contained. The Senate Report accompanying the 1971 legislation contains no hint of an intention to circumscribe or specify a bright-line boundary of the courts' remedial powers in deciding cases brought by the government, indicating instead that the object of the amendment was to remove any uncertainty that might exist as to the availability of "an inherent equitable power in the court to set things right and order restitution." Id. at 2291.

This cast of the 1971 amendments suggests that Congress painted in broad strokes, intending to remove any doubt of the presence of a court's power "to set things right" and issue orders in equity to undo that which should not have been done in the first

instance. Such an approach would include viewing the power to order restitution in a price-controls context as being at least equally directed to the ability to redress the entirety of excess payments made as it is to disgorgement by a particular defendant of a particular payment in fact received by that defendant.

On this point, experience under a predecessor of section 209, section 205(a) of the Emergency Price Control Act of 1942, is instructive. Section 205(a) of the 1942 Act provided authority for the courts to issue injunctions in order to "enforc[e] compliance" with price control regulations. Although section 205(a) -- like section 209 as originally enacted -- did not expressly give the courts authority to order restitution, in Porter v. Warner Holding Co., 328 U.S. 395 (1946), the Supreme Court held that such authority was implicit. See 328 U.S. at 398. The Court described "two theories" on which this inherent authority to order "restitution" could be based. Id. at 300. One of those theories did indeed involve the equity of requiring disgorgement "of that which has been illegally acquired"; the other, however, rested on the "inherent equitable jurisdiction which * * * authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress." Id. at 399-400 (emphasis added). Moreover, the Court expressly rejected the claim that "ask[ing] the court to act in the public interest by restoring the status quo" would be tantamount to imposing extra-statutory damages, stating that "[s]uch action is within the recognized power and within the highest tradition of a court of equity." Id. at 402. Thus, under the 1942 Act, it was settled that the proper measure of restitution was "the excess of a sale over a ceiling price," since that was what was needed to "enforc[e] compliance." Bowles v. Skaggs, 151 F.2d 817, 810 (6th Cir. 1945); see also Brister & Koester Lumber Co. v. Turney, 176 F.2d 843, 847-848 (Em. App.), cert. denied, 338 U.S. 870 (1949).

This view of restitution as primarily concerned with undoing that which should not have been done in the first place was carried forward into section 209 of the Economic Stabilization Act. Following Porter, the courts readily found in section 209 (then numbered section 205) "authority to require refunds * * * in order to give maximum effect to the wage-price freeze." University of Southern California v. Cost of Living Council, 472 F.2d 1065, 1070 (Temp. Emer. Ct. App. 1972), cert. denied, 410 U.S. 928 (1973). For example, in United States v. Lieb, 333 F. Supp. 424, 429 (W.D. Tex. 1971), aff'd, 462 F.2d 1161 (Temp. Emer. Ct. App. 1972), section 209 provided the basis for an order

that "mandatorily enjoined [the defendant] to restore the rents charged by him * * * and to restore the status quo ante by making restitution." That decision was cited as illustrating what Congress intended when it amended section 209 so as to recognize expressly the "inherent equitable power in the court to set things right and order restitution." S. Rep. No. 92-507, reprinted in 1971 U.S. Code Cong. & Admin. News 2283, 2291.

III.

The third question involves a slightly different undertaking, examining whether individual liability premised on the "central figure" theory on facts such as presented by Citronelle-Mobile departs so starkly from the "common law" of restitution to make that remedy unavailable as to a defendant beyond the amounts actually received by that defendant, particularly in view of legislative history associated with a 1975 amendment to another enforcement provision of the Emergency Petroleum Allocation Act rejecting any additional intention to change "existing case law relating to the individual responsibility of corporate directors, officers or agents for [corporate] violations * * * ." While much of the foregoing analysis indicates that the instances in which TECA has disregarded the corporate entity are in harmony with the pre-existing body of federal case law, the question remains whether the "common law" of restitution nonetheless clearly distinguished between requiring a defendant to return improper gains (restitution) and holding a defendant liable for the loss he had caused (damages).

There seems little basis for such a didactic view of the "common law" of restitution. First, in most of the case law examined above, even though the remedy in one sense or another has been linked to violation of a federal statute, the analysis nonetheless is directed to general principles of restitution rather than any peculiar alterations to the common understanding of that remedy that might have been perceived in a particular statute. Moreover, even earlier authority seems to have described restitution in a fashion congenial with the concept exposited by TECA. See, e.g., Bank of the United States v. Bank of Washington, 31 U.S. (6 Pet.) 8, 17, 19 (1832), in which the Court described "restitution" as "a legal obligation * * * to restore what the other party has lost." Indeed, the Restatement of Restitution (1937) expressly states (at 15, sec. 1 comment e) that "a person who has been unjustly deprived of his property * * * may be entitled to maintain an action for restitution against another although the other has not in fact been enriched thereby."

That the particular illustrations provided by the Restatement for this rule may not be fully apt (as Professors Palmer and Junger observe) seems tenuous ground on which to attempt to cabin this equitable remedy, since the Restatement purports (at 11, ch. 1 Introductory Note) only to set forth "general guides" which must then find their "value in a specific case." Here, discussion could both start and end with the truism that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes." Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-292 (1960).

IV.

Given that section 209 seems to have entrusted to the courts "the historic power of equity" to tailor remedies for violations of the Emergency Petroleum Allocation Act, it may be instructive also to examine TECA's case law implicating individual liability to see whether this has "unnecessarily and casually substitute[d] the chancellor's clumsy foot for the rule of law." Weinberger v. Romero-Barcelo, 456 U.S. 305, 335 (1982) (Stevens, J. dissenting).

TECA's case law, however, does not suggest that TECA has reflexively imposed liability on owners and officers of closely held corporations. In Johnson Oil Co. v. DOE, 690 F.2d 191 (Temp. Emer. Ct. App. 1982), for example, consolidated government-defensive and private actions, TECA specifically rejected a contention by the private plaintiffs that the principal shareholders and officers of an insolvent corporation should be held personally liable for crude oil certification violations, where TECA found no evidence that they had acted tortiously or had personally profited from the transactions. In contrast, in United States v. Arizona Fuel Corp., 638 F.3d 239 (Temp. Emer. Ct. App. 1980), cert. denied, 451 U.S. 985 (1981), the sole stockholder and president was held jointly liable for the insolvent corporation's obligations where he had acted both to avoid the corporation's meeting its obligations and had used the corporate assets otherwise available to fulfill them for his own personal benefit.

In Citronelle-Mobile, TECA seemed to rely heavily on the particular facts before it in imposing individual liability on the "central figure" in the transactions. Instead of teaching casual assertion and imposition of personal liability, that case suggests that the following factors are highly relevant in

determining whether any given case is a suitable one for individual liability for acts done through a corporation:

(a) Does it appear that the potential individual defendant consciously chose a course of action designed to skirt the law?

(b) Did he personally conduct or control the events of the transactions carrying out the course of action consciously chosen?

(c) Is his stake in the enterprise such that it fairly can be said that the economic rewards of the transactions are likely to redound, largely undiffused, to his benefit?

All of the case law examined in this review suggests that imposition of individual liability for actions done through the business of corporations is not casually to be imposed or indiscriminately applied. In proper cases invoking the courts' powers of equity, however, the courts may look to the overall economic reality of the enterprises in imposing liability "to set things right." TECA case law on this subject does not seem to have departed from these standards.

Sincerely,

Eric J. Fygi
Acting General Counsel

cc: Honorable James A. McClure
Ranking Minority Member

Department of Energy
Washington, DC 20585

June 15, 1988

Honorable J. Bennett Johnston
Chairman
Committee on Energy and Natural
Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

On May 19, 1988, Under Secretary Joseph F. Salgado appeared before your committee to discuss the Department's Economic Regulatory Administration and the "Central Figure" theory of restitution. Mr. Salgado was accompanied by Eric Fygi, Acting General Counsel, and Chandler Van Orman, Acting Administrator, Economic Regulatory Administration.

Following that hearing, you submitted written questions, on behalf of Senator McClure and Senator Weicker for our response to supplement the record. Enclosed are the answers to those questions, copies of which also have been sent to Senator McClure and Senator Weicker.

If you have any questions, please have your staff call Rebecca Thompson on 586-4277. She will be happy to assist.

Sincerely,

Robert G. Rabben
Assistant General Counsel
for Legislation

Enclosures

QUESTIONS AND ANSWERS

FOLLOWING THE

MAY 19, 1988, HEARING

BEFORE THE

COMMITTEE ON ENERGY AND NATURAL RESOURCES

UNITED STATES SENATE

WITNESS: JOSEPH F. SALGADO

UNDER SECRETARY

90-458 239

QUESTIONS FROM MINORITY MEMBERS
DOE'S PROSECUTION OF PETROLEUM OVERCHARGE CASES
MAY 19, 1988 HEARING

QUESTIONS FROM SENATOR McCLURE FOR DOE

Q.1 In its prosecution of petroleum overcharge cases, does DOE or ERA distinguish between claims for damages and remedies for restitution?

A.1 DOE, specifically ERA, prosecutes petroleum overcharge cases under the authority of, inter alia, section 209 of the Economic Stabilization Act of 1970, as amended (ESA). The remedy the agency seeks in these cases is the equitable relief authorized by section 209, including restitution as that term is used in that Section. ERA does not seek damages in enforcement actions.

In Citronelle I, Citronelle-Mobile Gathering, Inc. v. Edwards, 669 F.2d 717 (TECA), cert. denied, 459 U.S. 887 (1982), TECA held that the government had a duty to try to identify those who had been injured by the overcharges and to pay the refunds over to them in order to achieve direct restitution. 669 F.2d at 723. Thus, in the collection phase, i.e., when it is obtaining refunds of overcharges from responsible parties, the agency is concerned with undoing the effects of the violation, which effects are quantified as the amount by which the overcharges exceeded the prices permitted by the regulations. The same measure is used to determine the amount of primary damages

available under ESA section 210. See Eastern Airlines Inc. v. Atlantic Richfield Co., 470 F. Supp. 1050 (S.D. Fla.), aff'd, 609 F.2d 497 (TECA 1979).

Q.2 What is the DOE or ERA policy on granting amnesty? If a person is found personally liable under the central figure theory, but has actually not received any benefit, would DOE or ERA relieve that individual of a restitution obligation?

A.2 DOE does not have a policy under which amnesty is granted for a particular class of case types. However, DOE does have a policy of settling cases on the basis of an individual or corporate violator's ability to pay. Under this policy, DOE may settle cases for amounts considerably below the asserted liability amount, even when this is discounted for litigation risk. This policy is not confined to cases whose facts implicate the central figure theory of liability.

Q.3 What is the position of the Department of Justice with respect to the use of central figure theory in petroleum overcharge enforcement cases? Does the DOJ position on the use of central figure theory distinguish between damages and restitution actions?

A.3 We have referred this question to the Department of Justice.

Q.4 Use of the central figure theory appears to blur the distinction between law and equity. It also appears to have the effect of shifting the burden of proof from DOE to the defendant in certain circumstances. Please comment on these observations.

A.4 It is not apparent how use of the central figure theory, as such, might blur the distinction between law and equity. However, the nature of a regulatory price control regime itself -- where the impact of violations can be measured in dollar sums -- may result in seeming to blur distinctions between legal and equitable remedies for prior violations quite apart from the central figure theory.

For example, a plaintiff in a section 210 damage action at law may recover the full amount of regulatory overcharges even though that plaintiff's damages might have been mitigated by passing on to its customers some or all of the overcharges. See Eastern Airlines Inc. v. Atlantic Richfield Co., 470 F. Supp. 1050 (S.D. Fla.), aff'd, 609 F.2d 497 (TECA 1979). Although in a restitution action by the government under section 209, no proof is required that the plaintiff was damaged, Citronelle I, 669 F.2d at 722, under the law of restitution, as it has been applied in price control cases, a defendant whose misconduct fairly can be described as having caused the violation may be held liable for the full amount of the regulatory overcharge by resort to the branch of the law of restitution that

emphasizes the duty of the wrongdoer to restore the status quo rather than the duty of the defendant to surrender what he himself may have received. The result of both doctrines is that a defendant's liability in a section 210 damages action and in a section 209 restitution action can be measured as the amount by which the prices charged exceeded those permitted by the regulations.

From this it follows that the elements of proof between government restitution actions under section 209 and private damage actions under section 210 can in fact be quite similar. The government in a section 209 action bears the burden of demonstrating by a preponderance of the evidence that the violation took place and that the particular defendant or defendants are legally responsible for the violation. Where individual liability is asserted under the central figure theory, the government must establish by a preponderance of the evidence that the individual defendant is legally responsible for the overcharges in view of the defendant's personal conduct and the duties imposed on the defendant by the relevant statute and regulations, and this evidence must also be such as to convince a court that it is "fair" in the sense of equity jurisdiction to hold the individual defendant liable for the amount of the asserted overcharges. Thus it

does not appear that resort to the central figure theory of liability shifts the burden of proof from the government to the defendant; if anything, it suggests an additional burden on the government to establish that the equities of a given case, based on all of its facts, make it proper to impose individual liability. Cf. Johnson Oil Co. v. DOE, 690 F.2d 191 (TECA 1982).

Q.5 What, if any, distinction can be made in the application of restitutionary theories between common law restitution and restitution provided for as matter of Federal statute?

A.5 Traditional restitution has several forms, reflecting different approaches to the question whether the focus should be on the enrichment of the defendant or the loss to the plaintiff. Professor Junger has pointed out that there is an extensive body of law -- set forth in the Restatement -- which takes as its fundamental postulate that restitution consists of one person giving up something (money or other property) to someone who has a better claim. Under this concept of restitution, a defendant may not be required to give up more than he received. However, even under the Restatement's view of "common-law" or traditional restitution, there are circumstances in which a defendant may be required to give back more than he personally received. See, e.g., Gordon v. Burr, 506 F.2d 1080 (2d Cir. 1974); cf. FTC v. International Diamond, 1983-2 Trade Cas. (CCH) ¶ 65,506 (N.D. Cal. 1983). Thus, "enrichment" of the defendant "has been

adopted as the measure of restitution only where the claim to restitution was exceptionally weak or wrongful invasion produced excess profit, exceeding the value of the interest invaded." Dawson, Restitution Without Enrichment, 61 B.U. L. Rev. 563, 614 (1981).

While restitution has been described as a remedial measure based on unjust enrichment, the remedy also has been viewed as a means of restoring the parties to the status quo. Howard v. United States, 214 F.2d 759, 762 (10th Cir. 1954); see also United States v. Harris, 89 F. Supp. 537 (D.D.C. 1950). Restoring the parties to their status quo before the wrongful act can include requiring the plaintiff to return any benefit or proceeds derived from the transaction. Prudential-Bache Securities, Inc. v. Cullather, 678 F. Supp. 601, 606 (E.D. Va. 1987), citing Chris Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 391 (2nd Cir. 1973). Correlatively, in applying traditional principles of restitution, the United States District Court for the Northern District of California has stated that "if the loss suffered by the victim is greater than the unjust benefit received by the defendant, the proper measure of restitution may be to restore the status quo." FTC v. International Diamond, 1983-2 Trade Cas. (CCH) ¶ 65,506 at 69,459 (N.D. Cal. 1983).

In discussing statutory restitution, the fundamental question is the intent of Congress in the particular statute. Congress may have intended to adopt by reference one of the traditional forms of restitution, or restitution as defined under some other statute, or a definition specific to the particular statutory scheme.

In the formal sense, statutory restitution tends to fall into two major categories: restitution under statutes which specifically provide for restitution (e.g., Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580; Agricultural and Consumer Protection Act of 1973, 7 U.S.C. 2024; Rehabilitation Act of 1973, 42 U.S.C. 1383; 7 U.S.C. 2024; Rehabilitation Act of 1973, 42 U.S.C. 1383; Federal Aviation Act of 1958, 49 U.S.C. 1472), and restitution under statutes which do not use the term "restitution," but which provide that the government may seek injunctions against the conduct defined as unlawful in the particular statute and either expressly or implicitly authorize other forms of relief. In our view, the formal difference has little significance, at least in the case of section 209 of the ESA, because the sentence providing for restitution was added to make clear that the courts had the power to issue that type of ancillary order under the original wording of the statute.

Subject to the basic test of legislative intent, courts awarding restitution under a federal statute have employed the full range of equitable remedies that are available. For instance, in United States v. Anglian, 784 F.2d 765 (6th Cir. 1986), the court addressed the standards that govern an order of restitution from co-conspirators under the Victim and Witness Protection Act of 1982, 18 U.S.C. 3579, 3580. Restitution ordered by the court amounted to $12,649.28, to be paid by several defendants. That amount was determined by calculating the total loss sustained by the victim minus monies repaid by the defendant(s). Significantly, that amount was greater than the approximately $8,000 of illegal transactions covered by the indictment. The court specifically stated that "the purpose of restitution is to make the victim whole" for the loss sustained. 784 F.2d at 767. A similar approach was taken in a case arising under a statute which did not mention restitution specifically. NLRB v. Broderick Wood Products Co., 261 F.2d 548, 559 (10th Cir. 1958).

In cases arising under federal statutes, restitution has often exceeded the benefit enjoyed by the defendant. See, e.g., United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726 (8th Cir 1986) (Comprehensive Environmental Response,

Compensation, and Liability Act, 42 U.S.C. 9607; Resource Conservation and Recovery Act, 42 U.S.C. 6973); Lowen v. Tower Asset Management, Inc., 829 F.2d 1209 (2d Cir 1987); Donovan v. Mazzola, 716 F.2d 1226 (9th Cir 1983), cert. denied, 104 S. Ct. 704 (1984); Katsuros v. Cody, 744 F.2d 270 (2d Cir. 1980), cert. denied, 105 S. Ct. 565 (1984); Donovan v. Bryans, 566 F. Supp. 1258 (E.D. Pa. 1983) (Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq.); United States v. Boyd, 520 F.2d 642 (6th Cir 1975), cert. denied, 96 S. Ct. 776 (1976) (Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. 401 et seq.).

In some of these cases, individual liability has been imposed on parties beside the defendant corporations, such as a major stockholder (Northeastern Pharmaceutical, 810 F.2d 726); employees (Lowen, 829 F.2d 1209; Boyd, 520 F.2d 642); or a trustee or an officer (Bryans, 566 F. Supp. 1258; Katsaros, 744 F.2d 270; Mazzola, 716 F.2d 1226). Joint and several liability also was imposed upon the defendant corporations in all the cases cited above.

Q.6 In seeking restitution against an individual under central figure theory, does the government have to prove that the individual was unjustly enriched, or is it presumed? Does the individual have to prove he was not unjustly enriched, or is it presumed?

A.6. Unjust enrichment is not a necessary element to establish liability against an individual based on the central figure theory, but it may be a factor.

Q.7 What defense[s] are available to an individual under the central figure theory, in an action for damages or penalties? In an action for restitution?

A.7a DOE enforcement actions are brought under section 209 of the Economic Stabilization Act, 12 U.S.C. 1904 note, and seek only restitution of overcharges, not damages. Penalties, when they are requested, are sought only in civil or criminal judicial proceedings; they cannot be requested or imposed in administrative enforcement proceedings before the Office of Hearings and Appeals (OHA) and the Federal Energy Regulatory Commission (FERC). Subject to the limitations imposed because these matters are the subject of pending litigation, we discuss here, first, defenses in actions for restitution, principally before OHA and the FERC, and, second, defenses in actions for civil penalties. Actions for criminal penalties are prosecuted only by the Department of Justice. This response deals with defenses an individual may seek to raise to personal liability. Of course, if there has been no violation

at all, the issue of personal liability would not be reached in a given case.

The following defenses have been asserted in response to allegations of personal liability on a central figure/tortious conduct theory in DOE administrative actions for restitution. Because these issues are presently being litigated, it would be inappropriate for DOE to comment here on the merit of any of these defenses.

1. The individual in question was not a "central figure", i.e., he was not involved in the activity alleged to have been unlawful, or his involvement was merely ministerial or otherwise not sufficient to meet the test of participation in unlawful conduct.

2. The individual is not liable because he did not participate in each and every transaction alleged to have been at an unlawful price.

3. The individual is not liable because he did not benefit or did not benefit directly from the activity alleged to have been unlawful.

4. The individual is not liable because his actions were not willful, intentional or malicious.

5. The individual is not liable because the tortious conduct rule applies only to common law torts.

6. Johnson Oil Co. v. DOE, 690 F.2d 191 (TECA 1982), bars a finding of personal liability on a tortious conduct basis.

7. Individual liability is barred by 28 U.S.C. 2415(a), which places a 6-year limit on actions for money damages founded upon a contract, or 28 U.S.C. 2415(b), which places a 3-year limit on such actions if founded upon a tort.

8. Individual liability is or should be limited to the benefits actually received by the individual concerned.

9. Citronelle II, Citronelle-Mobile Gathering, Inc. v. Herrington, 826 F.2d 16 (TECA), cert. denied sub nom. Chamberlain v. United States, 108 S. Ct. 327 (1987), is not good law because Congress has suspended its operation.

10. Citronelle is not good law because it is contrary to common law principles shielding individuals from liability for corporate wrongdoing.

From 1971 onward, the civil penalty provisions applicable to overcharges have been in section 208(b) of the ESA, incorporated in 1973 into section 5(a)(1) of the Emergency Petroleum Allocation Act (EPAA), 15 U.S.C. 754(a)(1). These provisions authorize a district court, upon application by the government or a private litigant, to impose penalties of up to $2500 per violation upon anyone -- a firm or individual -- who performed the violative transaction. No showing of willfulness is required.

In 1975, Congress amended section 5(a) of the EPAA to create a carefully structured scheme of civil and criminal penalties for certain violations occurring after December 15, 1975. This provided for penalties of up to $20,000 for each violation, depending on the regulatory provisions violated, to be levied against corporate officers, directors, or agents who "knowingly and willfully authorize[d], order[ed], or perform[ed]" an act or practice that constituted the violation in

whole or in part. 15 U.S.C. 754(a)(3)(4). Liability for such penalties is without regard to any penalties to which the corporation might be subject.

The defenses to actions for penalties available to individuals under the foregoing provisions include defenses on the merits, e.g., that the defendant did not perform the act(s) in question, or that the act(s) performed did not constitute violations. In addition, a director, officer, or agent of a corporation may raise as a defense to an action for penalties under section 754(a)(4) that he or she did not "knowingly and willfully" authorize, order, or perform the act(s) in question.

Q.8 Has any defendant successfully asserted any of these defenses, in an action for damages or penalties? In an action for restitution? If yes, provide details for record?

A.8 Individuals have been successful in persuading the Economic Regulatory Administration to withdraw its charges of personal liability, or in persuading the Office of Hearings and Appeals to dismiss such charges with the ERA's agreement, in the following administrative enforcement actions for restitution:

Case	Individual	OHA Dkt. No.
Bayport Refining Co.	Olene Crumpton	HRO-0255
Kern Oil & Refining Co.	Russell B. Newton, Jr.	KRO-0520
Consolidated Materials, Inc.	Donald E. Baxter	HRZ-0027

In these cases, ERA agreed that the individual had not been sufficiently involved in the activity in question to be personally liable on a tortious conduct basis.

Q.9 Other than the defense that an individual is not a central figure, has a defendant avoided personal liability for restitution through assertion of a defense? Has a[] defendant avoided personal liability for restitution through assertion of a defense that . . . he is not a central figure? If yes, provide details for the record?

A.9 See Response to Question 8.

Q.10 Have any individuals named in petroleum overcharge enforcement cases pursuant to the theory of central figure paid a refund as part of a separate settlement with the DOE? If yes, provide details for the record.

A.10 Yes. Eight individuals have paid DOE amounts representing their respective liabilities. They are listed below, with the amount that each has paid. This list does not reflect amounts DOE has received in settlements entered into jointly with individuals who were charged as central figures and with the corporations with which they were associated.

Case (Including All Respondents)	Amount Paid
Clean Machine, Inc. Hal Musco	22,355.00

International Crude Corp.	
Gregg Pritchard	36,093.09
Revere Petroleum Corp. 1/	
James J. Cross	96,026.00
M. Kemp McMillan	500.00
Milton E. Walz	7,549.00
Gordon K. Walz	235,925.00
James E. Woolsey 2/	109,656.90
United Independent Oil Co.	
Peter Hirschburg	75,000.00

Q.11 If a person has assumed a prominent role in the unlawful activities of a company but did not retain all the fruits of the illegality, why should that person pay restitution of the full amount of the overcharges?

A.11 TECA has addressed this issue in several cases, including Sauder v. DOE, 648 F.2d 1341 (TECA 1981), and Citronelle II. In Sauder, TECA found that because Sauder was the sole operator of the leases and was the person who made the certifications at issue, "[i]t can fairly be said that it was he who caused the overcharges." In Citronelle II, TECA found that Chamberlain was the "animating force" behind the sales made at unlawful prices and, as in Sauder, "[i]t can fairly be said that it was Chamberlain who caused the overcharges."

1/ DOE is still conducting an enforcement action against Revere Petroleum Corp.

2/ In his Consent Order with DOE, Mr. Woolsey actually agreed to pay a total of $239,590.00 in respect of his individual liability.

The TECA cases present three sets of circumstances in which it may be appropriate to impose individual liability. First, in the case of lease operators, an individual's responsibility to manage all production, including allocating revenues derived in the course of operation of the lease, may typically result in the operator having caused the overcharge and make the operator an appropriate person to which to look "to set things right." Second, where ownership and control of the corporate entities involved are concentrated in one or more individuals, and those individuals formulated and carried out the actions comprising the violations, both personal misconduct and the economic reality of personal gain can warrant imposing individual liability. Third, where dominance and concentrated ownership of a corporation have been coupled with dissipation of corporate assets to the owner's benefit, frustrating the corporation's ability to meet its obligations, individual liability by the owner of the corporation has been found to be appropriate.

Q.12 Of the 40 or so individuals you have joined in the pending cases, have any of them been convicted of criminal offenses in connection with their petroleum selling activities during the price control period?

A.12 Seven of the individuals who have been joined in have been the 37 pending cases, convicted for criminal offenses in connection with their petroleum selling activities during the period of price controls.

Q.13 As I understand the litigation involving the oil overcharges in the Citronelle-Mobile Gathering case, Mr. Bart B. Chamberlain was named as one of the defendants when the Government originally counterclaimed. Is that correct? Was this claim for damages or restitution?

A.13 Yes, that is correct. The 1978 counterclaim named Mr. Chamberlain as a counterclaim-defendant and asked the court to enter a judgment "requiring Gathering, Services and Chamberlain to pay [the overcharges] into an escrow account . . . ." In its opening paragraph, the counterclaim specified that it sought "to compel Bart B. Chamberlain, Jr. ('Chamberlain'), Citronelle-Mobile Gathering, Inc. ('Gathering'), and Citmoco Services, Inc. ('Services'), . . . to make restitution of overcharges . . . ."

Q.14 Is it not true that very substantial illegal oil overcharges were found to have occurred in the Citronelle case?

A.14 Yes, it is true. The principal amount of the overcharges was found to be $6.8 million. With interest over the fourteen years since the overcharges

occurred, the amount currently due is approximately $20 million.

Q.15 From the outset, then, the Government sought recovery for these overcharges against Mr. Chamberlain, individually, the Citronelle-Mobile Gathering, Inc., and Citmoco Services, Inc. Is that correct? Was this recovery sought as damages or restitution?

A.15 Yes, that is correct. It was sought as restitution. See response to question No. 13.

Q.16 Isn't it true that Mr. Chamberlain has never presented any documentation at any stage in the case, including his petition to the Supreme Court for certiorari, showing what happened to that portion of the proceeds of these transactions that were received by the companies after they were received by the companies?

A.16 Yes, it is true.

Q.17 Did Mr. Chamberlain ever assert that he should not be required to make restitution of any of the proceeds of the overcharges which actually came into his hands, personally, by virtue of his position --

a. as the dominant shareholder of the two companies?
b. as an officer of the companies in the form of bonuses, etc.?

A.17 Mr. Chamberlain's primary argument was that the transactions were exempt from price controls as "export sales," so that no liability should attach to him or his corporations. He also argued, both at TECA and in his petition for certiorari in Citronelle II, that he should not be liable in any case because the violations were corporate and not personal, and in the

alternative, that his liability could not extend to money he did not personally receive.

Q.18 So Mr. Chamberlain did not contest, at the Supreme Court, that he could be required to make restitution of the violation amounts received?

A.18 Mr. Chamberlain's first certiorari petition sought Supreme Court review of TECA's decisions on the applicability of the export sales exemption and a 1-year Alabama statute of limitations. In his second certiorari petition, Mr. Chamberlain contended that personal liability could not attach for corporate violations, that central figure liability could result only from common law rather than statutory torts, that personal liability for money received by his corporations violated the "universal understanding" that restitution will never lie against someone who did not personally receive the money in question, and that TECA had erred in its choice of prejudgment interest rate.

Q.19 Am I correct that the record in the case does not show how much he may have received by way of corporate distributions in whatever form? Is the record dispositive on this point? What options remain available to Chamberlain?

A.19 While this information is not part of the official court record, Mr. Chamberlain did provide some relevant information in discovery proceedings. That information was provided to the government subject to a protective order which precludes its release.

No findings were made by the courts on the amount of corporate distributions that Mr. Chamberlain may have received. Accordingly, the record is not dispositive on this point.

It is inappropriate for the Department to suggest options on a matter which is the subject of pending litigation. Mr. Chamberlain has filed an action in federal court, Chamberlain v. United States, C.A. No. 87-0625-AH-M (S.D. Ala., filed July 6, 1987), in which he asks the court to set aside the judgment on the basis that the United States obtained the judgment in part by misleading the court in 1978 regarding the reasons for the United States then seeking an extension of time.

QUESTIONS FROM SENATOR WEICKER FOR DOE

Q.20 To summarize the issue in the Citronelle-Mobile case, did Mr. Chamberlain and the companies which he had overwhelming control of engage in the selling of crude oil at prices in excess of the ceiling price established by the Emergency Petroleum Allocation Act?

A.20 Yes.

Q.21 How many times did the Temporary Court of Appeals review this case? What were the conclusions in each of the reviews?

A.21 The Temporary Emergency Court of Appeals reviewed the case twice. In the first review (1982), the court rejected Mr. Chamberlain's argument that the transactions were exempt "export sales," as well as his argument that the government was not entitled to restitution absent proof of damage to specific victims. In the second review (1987), the court affirmed the district court's holding that Mr. Chamberlain was personally liable as the central actor in causing the violations, but, contrary to Mr. Chamberlain's arguments (referred to in the response to question 17, above) and the district court's limitations, TECA found him liable for the full amount of the overcharges.

Q.22 Is there any question that revenues from the crude oil sales in the Citronelle-Mobile case were received by Mr. Chamberlain and his companies?

A.22 There is no reason to believe otherwise, and Mr. Chamberlain has not alleged any other disposition.

Q.23 Did Mr. Chamberlain ever assert before the District Court or Court of Appeals that he had not received the revenues from the sale of the crude oil in question?

A.23 He has never asserted that no revenues were received, but there has been legal argument over how much he personally received as opposed to the corporations he owned and controlled. Mr. Chamberlain took the position, which the government did not dispute, that his personal receipt of the revenues was only about $50,000 -- his net after-tax share of a credit adjustment issued to him as proceeds of his sale to his companies of crude oil produced from the Citronelle field. The government, however, noted that he had the use and benefit of the bulk of the overcharge proceeds because he owned 90-95% of the equity in the corporations, and "it makes no practical difference whether the profit comes to the defendants in the form of a dividend or whether it merely enhances the value of their shares." Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45, 52 (2d Cir. 1939)(L. Hand, J.), aff'd, 309 U.S. 390 (1940).

Q.24 In oil overcharge cases, who are the victims of such illegal activities?

A.24 The victims are all U.S. purchasers of petroleum products, whether end-users or participants in the distribution chain, who were forced to absorb any portion of the overcharges.

Q.25 What monies have been recovered in the prosecution of oil overcharge cases?

A.25 Over $6 billion has been recovered in the prosecution of oil overcharge cases.

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON, D. C. 20426

CHAIRMAN

June 16, 1988

Dear Mr. Chairman:

I am happy to respond to your letter of May 26, 1988, asking about the Commission's role in reviewing Department of Energy remedial orders. Enclosed is a report responding to each of your questions.

If I can be of any further assistance, please do not hesitate to contact me.

Sincerely,

Martha

Martha O. Hesse

Enclosure

Honorable J. Bennett Johnston
Chairman, Committee on
Energy and Natural Resources
United States Senate
Washington, D.C. 20510

Enclosure

Report Responding to Questions by Chairman Johnston

Question 1: What are the filing fees for defendants to appeal remedial orders issued by DOE?

Answer: Under the Commission's regulations at 18 C.F.R. § 381.303, the fee for filing an appeal of a Department of Energy remedial order is $100 if the amount in controversy is under $10,000; $600 if the amount in controversy is between $10,000 and $29,999; and $10,260 if the amount in controversy is $30,000 or more.

Question 2: Please explain in detail how the Commission arrived at the fee structure for appeals of DOE remedial orders. Please submit any accounting data, man-hour studies, and any other technical information used by the Commission staff who drafted these remedial order fee regulations.

Answer: The assessment of filing fees, including fees for review of DOE remedial orders, is authorized by the Independent Offices Appropriations Act of 1952 (IOAA). 1/ In Order No. 494, the most recent in a series of final rules establishing and revising filing fees under the IOAA, the Commission described its method of calculating those fees. 2/ Under this process, the Commission calculates its fees using data on the work time expended on various Commission activities, on the number of completions of each activity during the year in question, and on its annual costs.

The Time Distribution Reporting System (TDRS) is used to collect data on staff time expended on various activities or product categories. The basic measure of work time expended is the work-month (WM), the amount of work represented by one employee's devotion of 100 percent of his or her time for one month. The Commission also compiles data on the number of completions in each product category and calculates an annual figure for its total costs per employee. The Commission's fee schedule is designed to account for all types of recoverable costs attributable to a particular Commission service, not merely the salaries of the employees who review the notices, applications, and requests in the particular product category. Pro rata portions of certain indirect costs are properly included in the

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1/ 31 U.S.C. § 9701.

2/ Filing Fees Under the Independent Offices Appropriations Act of 1952, 53 Fed. Reg. 15,374 (Apr. 29, 1988) III FERC Stats. & Regs. ¶ 30,809 (Apr. 6, 1988).

calculation of fees for various agency services. The Commission totals its average yearly costs per employee for: salaries and benefits; travel; transportation of things; rents, communication, and utilities; printing; supplies; equipment; and other services (excluding direct program contracts). The Commission then divides the total annual cost per employee by twelve to yield an average WM cost. The formula for determining each fee is the actual WMs dedicated to a given product category for the previous fiscal year (direct WMs plus a pro rata share of WMs reported for relevant support activities) divided by the number of actual completions in that product category in the previous fiscal year and then multiplied by the average cost per WM in the previous fiscal year. The Commission multiplies the average WM cost by the average number of WMs required to complete each activity to obtain the average cost for each activity and then sets its fees on the basis of those average costs.

The Commission established fees for appeals of DOE remedial orders through a rulemaking proceeding in Docket No. RM82-35-000. The Commission issued a Notice of Proposed Rulemaking in June 1982, 47 Fed. Reg. 27,375 (June 24, 1982) and a Final Rule, Order No. 395, in August 1984, 49 Fed. Reg. 35,348 (Sept. 7, 1984.

In Order No. 395, the Commission set three separate filing fees based on the amount in controversy in the remedial orders:

Amount in Controversy	Fee
$0 - $ 9,999	$ 100
$10,000 - $29,999	$ 600
$30,000 and over	$2,900

The $2,900 fee represented a 60% reduction from the average cost per completion of a DOE remedial order review in fiscal year 1983; in that year, the average cost was $7,489.95. The Commission found the 60% categorical reduction of the filing fee to be in keeping with the Commission's obligation to consider potentially inequitable burdens on small entities. The Commission also found the categorical reduction to be a matter of administrative fairness. The Commission has continued this 60% categorical reduction in fees through the most recent annual fee update reflecting fiscal year 1987 cost and completion data. 1/

The table below lists data for fiscal year 1983 (on which the fees established in Order No. 395 were based) and for the three most recent fiscal years, 1985, 1986, and 1987:

1/ Update of Filing Fees Under the Independent Offices Appropriations Act of 1952, 53 Fed. Reg. 15,383 (Apr. 29, 1988).

Review of DOE Remedial Orders

	Completions	Total WMS	WMs/ Completion	Monthly Cost/ Employee	Average Cost/Completion	Fee Average Cost Reduced By Approximate 60 %
FY 1983	23	36.1	1.57	$4,770.67	$ 7,489.95	$ 2,900
FY 1985	24	51.9	2.16	$5,330.50	$11,513.88	$ 4,600
FY 1986	28	97.8	3.496	$5,283.41	$18,468.57	$ 7,300
FY 1987	17	78.1	4.594	$5,583.27	$25,650.20	$10,260

Question 3: Have there been any appeals of DOE remedial orders to the Commission where the filing fee to defend charges was higher than the standard fee prescribed in 18 C.F.R. § 381.303?

Answer: No.

Question 4: Are there legal and policy factors that distinguish the imposition of filing fees for defendants charged in DOE remedial orders from those filing fees that must accompany applications for a right to increase rates or construct pipeline facilities?

Answer: In response to the Notice of Proposed Rulemaking in RM82-35-000, some commenters asserted that the imposition of a substantial fee for the review of a DOE remedial order should be barred by due process considerations because the fee may have a chilling effect on the exercise of the right to judicial review. The Commission responded when adopting the final rule in Order No. 395. The Commission noted that the 60% categorical reduction and case-by-case waiver procedures would prevent economic hardships and adequately protect the rights of indigents. 4/

Question 5: When the Commission hears an appeal of a DOE remedial order, does it limit its review to issues of law in the same manner that a federal circuit court of appeals would be limited in reviewing a federal district court case? A Commission case? Is the scope of the Commission's review by a Commission administrative law judge (ALJ) the same as the review by the full Commission? What different functions, if any, are there for ALJ review and Commission review?

Answer: The Commission's role in reviewing DOE remedial orders is different from the appellate role of a federal circuit

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4/ 49 Fed. Reg. 35,348 (Sept. 7, 1984) at 35,352.

court of appeals, whether reviewing a federal district court decision or a Commission decision. The Commission does not confine itself to a review of issues of law. On the contrary, under section 503 of the Department of Energy Organization Act (42 U.S.C. § 7193), the essence of the Commission proceeding is its factual character. The Commission's factual review is not confined to the evidentiary record developed at DOE, and the order issued by the Commission is to be "based on findings of fact." See also our response to Question 9, below.

In DOE remedial orders cases there is no difference between the scope of review by a Commission ALJ and the full Commission. The chief differences between their respective functions are that the ALJ actually conducts the evidentiary hearings and issues only a proposed decision. Only the full Commission may issue a final decision on review of a DOE remedial order.

Question 6: In an appeal of a DOE remedial order, does the Commission have the authority to review the validity of DOE regulations in the area that generated the remedial order? Has the Commission ever done so? If so, please give details of the facts and the outcomes?

Answer: The Commission has ruled that it will not review the validity of DOE's underlying regulations. Order Clarifying Scope of Review, issued December 10, 1987 (copy enclosed). The Commission's review role is concerned with the application of DOE's statutory and regulatory standards to specific facts. Congress has not vested the Commission with generalized, plenary power to probe the legality or the wisdom of DOE's underlying rules.

While the Commission may in a few cases have addressed specific arguments relating to the validity of DOE rules, it has never reversed or modified a DOE remedial order on the basis that an applicable DOE rule was invalid.

Question 7: In affirming a DOE remedial order that orders a defendant to make restitution for moneys never actually received by that person as often adopted by DOE in remedial orders citing the holding in Citronelle-Mobile Gathering, Inc., et al. v. Herrington, 826 F.2d 16 (TECA 1987), does the Commission have the power to order such restitution? Under what authority?

Answer: Assuming the Commission finds in the particular circumstances that the restitution remedy is consistent with the holding of the Citronelle decision or otherwise authorized by law, it may approve such a remedy. The Commission has the statutory authority to issue an order "affirming, modifying, or vacating" the DOE remedial order, "or directing other appropriate

relief." Section 503(c) of the Department of Energy Organization Act, 42 U.S.C. § 7193 (c). It may therefore approve any remedy that DOE could lawfully impose. However, the Commission is not bound to accept even a lawful DOE remedy if it concludes that another lawful remedy would be more appropriate in the circumstances.

Question 8: If the Commission affirms a DOE remedial order, is the defendant entitled to a trial de novo in a district court?

Answer: It is our understanding that the defendant is entitled to a trial in a federal district court on the basis of the record developed at DOE and the Commission, rather than a trial de novo. However, since enforcement and judicial review proceedings are the responsibility of DOE rather than the Commission, this question should more appropriately be addressed to DOE.

Question 9: What is the Commission's understanding of its functions and the precise scope of those functions in its review of DOE remedial orders?

Answer: Under section 503(c) of the Department of Energy Organization Act, appeal to the Commission is intended to serve as an internal agency review of specific allegations against particular individuals, to be conducted by officials who have not been involved in DOE's initial "prosecutorial" action. Congress wished to assure that, whatever procedures DOE employed in exercising its authority to issue remedial orders, an adversely affected party could obtain "a factual hearing upon the evidence" before the Commission. Atlantic Richfield Co. v. Department of Energy, 769 F.2d 771, 787-788 (D.C. Cir. 1984). Rather than duplicating judicial review, the Commission conducts an independent evidentiary hearing to determine whether the regulatory standards earlier established by DOE have been properly applied to the particular facts of each remedial order proceeding. In making that determination, the Commission may consider disputed issues of fact, legal questions relating to the proper interpretation of DOE regulations as applied to the facts, and legal challenges to the adequacy of procedures employed by DOE in the particular remedial order case. However, it does not consider purely legal challenges to underlying DOE regulations that can be resolved without further development of an evidentiary record. Such issues include whether DOE followed proper procedures in promulgating the regulations or whether an otherwise clear regulatory prohibition is consistent with DOE's statutory authority. The Commission has no special competence to decide such questions and no mandate from Congress to serve as a general reviewer of DOE's rules and standards. Judicial review of the validity of DOE regulations is available in the federal district courts.

Attachment

J. BENNETT JOHNSTON, LOUISIANA, CHAIRMAN
DALE BUMPERS, ARKANSAS
WENDELL H. FORD, KENTUCKY
HOWARD M. METZENBAUM, OHIO
JOHN MELCHER, MONTANA
BILL BRADLEY, NEW JERSEY
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WYCHE FOWLER, JR., GEORGIA
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MALCOLM WALLOP, WYOMING
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FRANK M. CUSHING, STAFF DIRECTOR FOR THE MINORITY
GARY S. ELLSWORTH, CHIEF COUNSEL FOR THE MINORITY

United States Senate
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150

July 13, 1988

The Honorable Joseph F. Salgado
Under Secretary
Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear Mr. Salgado:

Enclosed are followup questions concerning the central figure theory of liability for restitution under the oil overcharge program.

Please complete your responses by July 25, 1988.

If you have any questions concerning this issue, please contact Joel Saltzman of the Committee staff at 224-7932. Thank you in advance for your cooperation in this important matter.

Sincerely,

J. Bennett Johnston
Chairman

JBJ/js

Enclosure

Followup Questions for Joseph Salgado from Senator Johnston

1. You stated at the July 11, 1988, hearing that DOE now has serious legal and policy concerns with the central figure theory, and plans to review each case in which the central figure theory has been alleged for restitution in oil overcharge cases. Is it DOE's position that some cases may still warrant the application of the central figure theory to get restitution of moneys never received for violations of the EPAA? If yes, please explain DOE's position as to when the theory would and would not be appropriate.

2. Are officials of ERA or OHA undertaking this case-by-case review, or is it an analysis by an independent unit within DOE? If ERA or OHA personnel are involved in preparing or conducting such reviews, please give the names and responsibilities of these officials, and the extent of their participation.

3. Does DOE consider FERC decisions reviewing remedial orders issued by OHA as binding on subsequent DOE remedial orders? If not, why not?

The following questions relate to several responses that DOE submitted on June 15, 1988, to answer post-hearing questions on the central figure theory submitted by Senators Weicker and McClure. Certain DOE responses suggest that the individual in the Citronelle-Mobile case failed to disclose what happened to the portion of the proceeds received by the Citronelle companies.

4. Were the responses to Questions 16, 19 and 23 prepared by someone who is familiar with the record in the Citronelle-Mobile case, and, if so, on what basis is that person familiar with that record?

5. Did DOE have uninhibited access to the corporate books and records of the companies in the Citronelle-Mobile case for more than 3 weeks in July 1975? If not, state with particularly any books, records or documents to which DOE was denied access.

6. Did the information obtained by DOE in the course of its July 1975 audit include documentation showing what happened to that portion of the proceeds of the challenged transactions that was received by the companies, through the date of the audit, including the payment of $3.4 million in state and federal corporate income taxes by the companies? If not, state with particularity what documentation was requested but not received.

7. In August and September, 1985, did the government engage in comprehensive discovery of all potentially relevant financial

16. In light of the responses to Questions 12 through 15, how do you explain DOE's June 15, 1988, response that "the record is not dispositive on this point [corporate distributions that may have been received by Mr. Chamberlain]"?

17. In light of the responses to Questions 12 through 15, please explain DOE's June 15, 1988 response No. 23 that "there has been legal argument over how much he [Mr. Chamberlain] personally received as opposed to the corporations he owned and controlled." Is this statement intended to mean anything more than that the government contends, as a matter of law, that Mr. Chamberlain should be deemed to have received revenues that were received by the corporations? If so, please identify with particularity the documents or statements wherein the government contended that Mr. Chamberlain personally received revenues from the sale of crude oil in question that were greater than the amounts identified in Questions 12 and 13 above.

18. DOE's June 15, 1988, response No. 7 lists defenses that have been asserted for central figure theory liability. Have any individuals prevailed using any of these defenses? If so, please name the individuals, the successful defenses used, whether it was ERA prosecutors who withdrew the charges, or whether OHA dismissed, and the dates of the filing and dropping of charges.

19. Must ERA prosecutors agree with OHA determinations to drop charges before those charges are actually dropped, as indicated in response No. 7?

information pertaining to the companies and to Mr. Chamberlain personally, for the period beginning November 1973 (prior to the transactions), through August 1985?

8. Did the information furnished in response to discovery constitute documentation showing what happened to that portion of the proceeds of the challenged transactions that was received by the companies, through the date of the response? If not, please state with particularity what documentation was requested but not received.

9. Did Mr. Chamberlain's lawyers produce for the government a flow chart which was based upon documentation furnished to the government, and which summarized what happened to that portion of the proceeds that was received by the companies? Was this flow chart received into evidence as Exhibit 14 in the trial of the Citronelle-Mobile case without challenge by the government as to its accuracy? If not, please state with particularity the basis for such denial.

10. Doesn't trial Exhibit 14 constitute "documentation ... showing what happened to proceeds of these transactions that were received by the companies after they were received by the companies"? If not, please state with particularity the basis for such denial.

11. In view of the responses to the questions 5 through 10, please explain DOE's June 15, 1988, response to question No. 16 that "Yes, it is true" that Mr. Chamberlain has never presented any documentation at any stage in the case ... showing what happened to that portion of the proceeds of these transactions that were received by the companies ..."

12. Did Mr. Chamberlain furnish responses to interrogatories and documents in response to production requests that fully disclosed how much he "received by way of corporate distributions in whatever form" for the period November 30, 1973 through August 13, 1985? If not, please state with particularity what information on this subject was requested but not produced.

13. Did the government offer in evidence as part of its case Paragraph 36 of Mr. Chamberlain's proposed findings of fact, which established as an element of the government's proof that Mr. Chamberlain's total "excess" revenues from the sales of crude oil in question were $147,828.59, before taxes?

14. Did the government stipulate that "the amount of federal income tax paid by ... Bart B. Chamberlain, Jr. attributable to the challenged transactions shall be deemed to be $85,000, and the amount of state income tax shall be deemed to be $497."?

15. Did the government, apart from the items of proof referred to in the two previous questions, introduce any evidence concerning the receipt by Mr. Chamberlain of any proceeds of the challenged transactions? If yes, please identify specifically such evidence.

Department of Energy
Washington, DC 20585

July 25, 1988

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

Enclosed are staff-prepared answers to the followup questions, numbers three through nineteen, posed in your July 13, 1988, letter. I want to respond in this letter to the first two questions that you raised, regarding the independent, case-by-case review that DOE has undertaken of central figure litigation.

To conduct that review, I have formed a Central Figure Review Group. The members of that Group are: Assistant Secretary and Under Secretary designate Donna R. Fitzpatrick; Assistant Secretaries C. Anson Franklin, David B. Waller, and Theodore J. Garrish; Acting ERA Administrator Chandler L. van Orman; Acting General Counsel Eric J. Fygi; Mr. Frank Ruddy; and Assistant General Counsel for General Litigation Marc Johnston. Staff assistance is being provided by attorneys from the Office of General Counsel. Because of the nature of its responsibilities, we do not anticipate utilizing personnel from the Office of Hearings and Appeals in conducting this review. The Review Group may, during its inquiry, choose to interview attorneys from ERA with respect to particular cases for which they are responsible.

I have charged the Central Figure Review Group with the responsibility of examining both the legal and policy issues raised by the central figure theory, formulating criteria to ensure against improper or unwarranted use of the central figure theory, reviewing on a case-by-case basis the litigation in which the central figure theory has been asserted, and reporting its findings to me.

Since the mandate of the Central Figure Review Group is to conduct a truly independent review of this important matter, I am not in a position to prejudge the criteria it will formulate in determining the types of circumstances when application of the theory might or might not be appropriate. However, I fully expect the Group to give serious consideration to the concerns that have been expressed about application of the

central figure theory to obtain restitution of moneys never received for violations of the EPAA.

As I testified to your Committee, the time frame established for this review process contemplates that it will be completed by the end of Summer. Specifically, the Central Figure Review Group has set a tentative date of September 6 for reporting its findings to me. When I have had a chance to examine those findings, I shall of course promptly advise the Committee of the steps that will be taken in response to them.

If I can be of any further assistance, please let me know.

Yours truly,

Joseph F. Salgado
Under Secretary

cc: Honorable James A. McClure
Ranking Minority Member

QUESTIONS FOR JOSEPH SALGADO FROM SENATOR JOHNSTON

QUESTION NO. 3

Does DOE consider FERC decisions reviewing remedial orders issued by OHA as binding on subsequent DOE remedial orders? If not, why not?

ANSWER

The OHA is the agency within DOE to which the Secretary has delegated the function of issuing remedial orders under section 503 of the Department of Energy Organization Act. In several decisions, OHA has indicated that, in a proper case, it may not treat FERC decisions in prior cases as binding if, for example, there appears to be a TECA decision which requires a result different from that embodied in the FERC decision. See, e.g., Texaco, Inc., 16 DOE ¶ 83,016 at 86,165 (1987). See also J.R. Cone, 14 DOE ¶ 83,011 at 86,060 (1986); Atlantic Richfield, 11 DOE ¶ 83,027 at 86,272 n.61 (1984).

QUESTIONS RELATED TO RESPONSES THAT DOE SUBMITTED ON JUNE 15, 1988

QUESTION NO. 4

Were the responses to Questions 16, 19 and 23 prepared by someone who is familiar with the record in the Citronelle-Mobile case, and, if so, on what basis is that person familiar with that record?

ANSWER

A number of persons with varying degrees of familiarity with the record in the Citronelle-Mobile case participated in

drafting and reviewing the responses to Questions 16, 19, and 23. Some of those who reviewed the responses had no first-hand familiarity with the record. Those who were directly familiar with the record based their understanding of it on a combination of contemporaneous examination of relevant portions of the record and personal recollection of portions of the proceeding which they had participated in or observed.

QUESTION NO. 5

Did DOE have uninhibited access to the corporate books and records of the companies in the Citronelle-Mobile case for more than 3 weeks in July 1975? If not, state with particularly any books, records or documents to which DOE was denied access.

ANSWER

We are unable to state definitely what was the extent of access DOE had to the corporate books and records of the companies in July of 1975. Trevor Hawk, the auditor who conducted that on-site audit, is deceased, so we are conducting a search for relevant documents. Those files have been retired and are not immediately available. At the initial trial on the subpoena enforcement aspect of the case, Mr. Hawk testified that he was given access to the books and records that he needed for purposes of his audit. He indicated that what he had been looking for was financial records concerning the sales in question, which under audit methodology at that time probably would not have included any attempt to trace the proceeds after initial receipt by the seller. So without knowing exactly what access he requested, we cannot indicate whether or not Mr. Hawk was given uninhibited access. He did state that there were some

types of records that he would not have been interested in. The department ultimately determined that it had not received sufficient information during the course of that audit, and issued the subpoenas which became the subject of the Chamberlain Group's initial complaint in the Citronelle-Mobile case.

QUESTION NO. 6

Did the information obtained by DOE in the course of its July 1975 audit include documentation showing what happened to that portion of the proceeds of the challenged transactions that was received by the companies, through the date of the audit, including the payment of $3.4 million in state and federal corporate income taxes by the companies? If not, state with particularity what documentation was requested but not received.

ANSWER

It is not possible to answer that question without reviewing the audit files to see what information was actually obtained, so that we could say whether they show what had happened to the portion of the proceeds which the companies received. As noted in the response to Question 5, we are conducting a search of the files for relevant information. It should be noted that, as Mr. Hawk testified at the trial, the focus of the July 1975 audit was on the questions of whether there had been a violation and what the violation amount consisted of, rather than the disposition of the proceeds.

QUESTION NO. 7

In August and September, 1985, did the government engage in comprehensive discovery of all potentially relevant financial information pertaining to the companies and to Mr. Chamberlain personally, for the period beginning November 1973 (prior to the transactions), through August 1985?

ANSWER

In response to an order compelling compliance with discovery entered by Chief Judge Alaimo, the Chamberlain Group, in August of 1985, provided substantial financial information regarding Chamberlain and his companies. As we indicated in the response to Question 19 in the June 15 letter, these materials are the subject of a protective order, which precludes dissemination of information submitted in response to the discovery. We attach a copy of the protective order.

QUESTION NO. 8

Did the information furnished in response to discovery constitute documentation showing what happened to that portion of the proceeds of the challenge transactions that was received by the companies, through the date of the response? If not, please state with particularity what documentation was requested but not received.

ANSWER

In order to respond to this question, the Department would be required to reveal the essence of the information contained in the Chamberlain Group's discovery responses. In view of the limitations on disclosure imposed by the protective order, the Department is not in a position to respond to this question substantively.

QUESTION NO. 9

Did Mr. Chamberlain's lawyers produce for the government a flow chart which was based upon documentation furnished to the government, and which summarized what happened to that portion of the proceeds that was received by the companies? Was this flow chart received into evidence as Exhibit 14 in the trial of Citronelle-Mobile case without challenge by the government as to its accuracy? If not, please state with particularity the basis for denial.

ANSWER

At the trial in 1985, the Chamberlain Group's lawyers introduced a flow chart into evidence as Exhibit 14. The flow chart was prepared in two versions, apparently, one of which was received into evidence at the trial in 1985 over the government's objection that it was irrelevant. The government did not challenge its accuracy.

The chart shows how the proceeds were immediately shared as between the two companies, and the taxes paid by each company on its share. The more elaborate version then shows the effect of operating losses on the companies through, respectively, December 31, 1979, and February 28, 1980, but does not show distributions over those periods, or any information after those dates.

QUESTION NO. 10

Doesn't trial Exhibit 14 constitute "documentation ... showing what happened to proceeds of these transactions that were received by the companies after they were received by the companies"? If not, please state with particularity the basis for such denial.

ANSWER

For the reasons stated in the answer to Question 9, neither version of the chart purports to show what disposition has been made of the after-tax funds the corporations received.

QUESTION NO. 11

In view of the responses to the questions 5 through 10, please explain DOE's June 15, 1988, response to question No. 16 that "Yes, it is true" that Mr. Chamberlain has never presented any documentation at any stage in the case ... showing what

happened to that portion of the proceeds of these transactions that were received by the companies ..."

ANSWER

The answer to Question 16 was prepared based on the understanding that none of the documents produced in discovery and subject to the protective order were introduced into the record, and that the question was addressed to documents which had been submitted to the courts either in evidence or in argument, "at any stage of the case, including [the] petition for certiorari." As noted above, Exhibit 14, which was admitted in evidence at the trial in 1985, does not "show what happened to proceeds of these transactions that were received by the companies."

QUESTION NO. 12

Did Mr. Chamberlain furnish responses to interrogatories and documents in response to production requests that fully disclosed how much he "received by way of corporate distributions in whatever form" for the period November 30, 1973 through August 13, 1985? If not, please state with particularity what information on this subject was requested but not produced.

ANSWER

In view of the protective order's limitation on disclosure of the discovery responses, the Department states that Mr. Chamberlain submitted substantial responses to the government's discovery requests for a statement of payments, loans, or transfers of funds between the companies and Mr. Chamberlain.

QUESTION NO. 13

Did the government offer in evidence as part of its case Paragraph 36 of Mr. Chamberlain's proposed findings of fact, which established as an element of the government's proof that Mr. Chamberlain's total "excess" revenues from the sales of crude oil in question were $147,828.59, before taxes?

ANSWER

The government offered into evidence as a judicial admission proposed finding of fact No. 36 offered by the Chamberlain Group during the proceedings before Chief Judge Alaimo in 1985.

QUESTION NO. 14

Did the government stipulate that "the amount of federal income tax paid by ... Bart B. Chamberlain, Jr. attributable to the challenged transactions shall be deemed to be $85,000, and the amount of state income tax shall be deemed to be $497."?

ANSWER

Judge Alaimo found that "the parties have stipulated that Chamberlain earned $147,828.59 in excess of the applicable ceiling prices for domestic oil sales." Order of December 30, 1985 Slip op. at 12. He found further that "the parties have since stipulated that Chamberlain paid $85,497 in state and federal income taxes as a result of his excess earnings from the PETCO sales." Order of February 27, 1986 Slip op. at 2.

QUESTION NO. 15

Did the government, apart from the items of proof referred to in the two previous questions, introduce any evidence concerning the receipt by Mr. Chamberlain of any proceeds of the challenged transactions? If yes, please identify specifically such evidence.

ANSWER

No. The government offered into evidence the Hawk Affidavit but the court sustained Mr. Chamberlain's objection to it.

QUESTION NO. 16

In light of the responses to Questions 12 through 15, how do you explain DOE's June 15, 1988, response that "the record is not dispositive on this point [corporate distributions that may have been received by Mr. Chamberlain]"?

ANSWER

As we explained in the original response to Question 19, there was no judicial finding on the amount of corporate distributions that may have been received by Mr. Chamberlain. Judge Alaimo found in his order of December 30, 1985, that "Defendant Chamberlain earned $147,828.59 -- in excess of the ceiling prices applicable to nonexempt domestic oil sales -- from his share of the Citronelle crude Gathering and Services acquired for resale to PETCO." (Slip op. at 6). The Court made no finding with respect to the amount of corporate distributions Mr. Chamberlain may have received. Indeed, there may be no evidence in the record on that issue. Accordingly, in our view, the record is not "dispositive" of the question of Mr. Chamberlain's receipt of corporate distributions.

QUESTION NO. 17

In light of the responses to Questions 12 and 15, please explain DOE's June 15, 1988 response No. 23 that "there has been legal argument over how much he [Mr. Chamberlain] personally received as opposed to the corporations he owned and controlled." Is this statement intended to mean anything more than that the government contends, as a matter of law, that Mr. Chamberlain should be deemed to have received revenues that were received by the corporations? If so, please identify with particularity the documents or statements wherein the government contended that Mr. Chamberlain personally received revenues from the sale of crude oil in question that were greater than the amounts identified in Questions 12 and 13 above.

ANSWER

The auditor on the case for the Department of Energy, Trevor Hawk, ascertained that on December 31, 1974, Citronelle-Mobile Gathering made payments to interest owners, including Bart B. Chamberlain, in crude oil produced from the Citronelle Field's Citronelle Unit. Mr. Chamberlain's share was $147,828.59. Mr. Hawk so deposed in an affidavit dated January 11, 1980, made in support of counterclaimant's motion for summary judgment.

On September 9, 1985, counterclaim-defendants submitted proposed findings of fact which stated, "The total amount earned by Chamberlain, in excess of of [sic] the ceiling prices applicable to non-exempt sales, for his share of Citronelle Unit production acquired by Gathering and Services for resale to PETCO was $147,828.59. . . ."

Subsequently at the trial held October 1 and 2, 1985, the government attempted to introduce the Hawk affidavit in lieu of Mr. Hawk's testimony because Mr. Hawk had died the previous spring. In opening the trial, Judge Alaimo had said, "One thing that I might tell you in advance, I don't think the issue of Chamberlain's personal liability is open. . . . It's my view that [Judge Pittman's] holding that the liability of Chamberlain is limited to the extent of his receipt of the proceeds from the sales of PETCO is the law of the case. I don't care to hear about it." He subsequently ruled against admitting the Hawk affidavit as lacking the necessary trustworthiness, and would not permit the government attorney to argue the issue of

Chamberlain's liability.

The government challenged the district court's limit on Chamberlain's liability to the proceeds he received in its appeal to TECA. The government cited Sheldon v. Metro-Goldwin Pictures, 106 F.2d 45, 52 (2d Cir. 1939) (L. Hand, J.), aff'd on other issues, 309 U.S. 390 (1940), for the point that defendant shareholders were held responsible for making restitution of the corporation's profits whether or not the shareholders actually received the proceeds or instead merely had the value of their shares enhanced by the amount of the unlawful profits. In this case, Mr. Chamberlain's ownership interest in Citronelle-Mobile Gathering, Inc. was 95%.

QUESTION NO. 18

DOE's June 15, 1988, response No. 7 lists defenses that have been asserted for central figure theory liability. Have any individuals prevailed using any of these defenses? If so, please name the individuals, the successful defenses used, whether it was ERA prosecutors who withdrew the charges, or whether OHA dismissed, and the dates of the filing and dropping of charges.

ANSWER

DOE's June 15, 1988, response to question No. 8 identified three individuals who were successful in asserting defense number one identified in reply to question No. 7 of DOE's June 15

response. Those individuals, and the dates of the filing and dropping of charges are as follows:

Individual	Filing Date	Dismissal Date
Olene Crumpton	9/20/84	3/13/87
Russell B. Newton, Jr.	9/17/87	4/20/88
Donald E. Baxter	2/28/86	3/13/86

In the case of Mrs. Crumpton, dismissal (in which ERA concurred) was by order of the Office of Hearings and Appeals. In the case of Mr. Baxter, ERA's joinder motion was denied by OHA order. In the case of Mr. Newton, ERA withdrew its joinder motion.

QUESTION NO. 19

Must ERA prosecutors agree with OHA determinations to drop charges before those charges are actually dropped, as indicated in response No. 7?

ANSWER

OHA has the authority to grant a motion to dismiss or otherwise drop charges against an individual in a PRO proceeding, whether or not ERA opposes the dropping of the charges. If ERA agrees with an individual's request to OHA to drop charges against the individual, the request may be disposed of by OHA without the expenditure of additional litigation resources on that issue by either party to the request.

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GARY G. ELLSWORTH, CHIEF COUNSEL FOR THE MINORITY

United States Senate
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150

August 12, 1988

The Honorable Joseph F. Salgado
Under Secretary
U. S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D. C. 20585

Dear Mr. Salgado:

Thank you for your July 25th letter containing personal responses to my questions one and two regarding DOE's promised legal and policy review of the central figure theory. I commend you for establishing a Central Figure Review Group to examine independently the policy and legal issues involved in this important matter. I know several of the members personally, and am confident that their independent review will be comprehensive and objective.

In addition, the "staff-prepared answers to the follow-up questions, numbers three through nineteen", tend to endorse your decision to form your review group from persons not currently a part of the overcharge enforcement program. Many of those responses were nonpersuasive and, in several cases, if not intentionally evasive, at the very least non-responsive.

In particular, it appears that several staff responses to my July 13th questions are at a variance with the impressions left by DOE's June 15th (staff?) responses to questions posed by Senators McClure and Weicker following the May 19th central figure theory hearing. For example, the June 15th responses numbered 16, 19, and 23 convey the clear impression that the record in the Citronelle litigation did not show what happened to the overcharge funds received by the companies. In stark contrast, the staff's July 25th answers contend that they cannot give a definitive answer and are conducting a search of their files for relevant information.

This, and other inconsistencies render the current record in the central figure theory hearing as incorrect. I would be most interested to see staff's attempt to reconcile those inconsistencies.

Further, the staff's responses to several questions posed July 13th simply fail to answer the questions, or invoke the court's protective order as precluding a response. The questions posed were crafted so that responses could easily avoid disclosing any protected materials. The questions merely ask whether discovery materials were

fully provided because prior answers for the record stated that they were never presented for review by the government.

In light of the murky state of the DOE portion of the hearing record on the central figure theory, please request that the staff carefully review and reconcile any differences in its June 15th post-hearings responses, and its July 25th responses. Please request further that the staff answer completely all of those questions where they declined, invoking the protective order, or merely failed to respond to the second part of the question, such as in response to question number 3.

In addition, please have staff answer the following:

1. Does DOE know how much money the Citronelle corporations received as a result of the regulatory violations?

2. Does DOE know the amount of corporate taxes paid by those corporations on account of the receipt of such moneys?

3. Does DOE know what corporate payments were made to Mr. Chamberlain, from a time prior to the challenged transactions (November 1973) through August 1985, in the form of salaries, bonuses, dividends, fees, or any other transfer of assets?

4. Did DOE introduce evidence at the trial of the case as to the amount of money Mr. Chamberlain received as a result of the challenged transactions?

5. What was that amount?

6. Did DOE attempt to show receipt by Mr. Chamberlain of any additional moneys? If so, provide copies of documents or statements made in such attempt.

7. Is DOE's unqualified response to Senator McClure's Question 16 correct?

Thank you once again for your attention to this important matter.

Sincerely,

J. Bennett Johnston
Chairman

JBJ/jsg

OFFICIAL COMMITTEE FILE

Department of Energy
Washington, DC 20585

SENATE COMMITTEE ON
ENERGY AND NATURAL RESOURCES
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WASHINGTON, D.C. 20510

August 22, 1988

Dear Mr. Chairman:

This is an interim reply to your letter of July 7, 1988, regarding the Department's prosecution of corporate officials for oil overcharges under the "central figure" theory.

As Under Secretary Salgado indicated in his letter of July 25, 1988, a Central Figure Review Group has been established within the Department to study the application of the theory in petroleum enforcement cases. The Under Secretary, however, has since recused himself from involvement in this matter. As noted in his letter responding to your questions, the Central Figure Review Group has set a tentative date of September 6 for reporting its findings. As Chairperson, I assure you that the Review Group will consider the concerns raised by you and Senator McClure. After those findings have been examined, we will provide a further reply to you.

Yours truly,

Donna R. Fitzpatrick

Donna R. Fitzpatrick
Associate Under Secretary

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

cc: Honorable James A. McClure
Ranking Minority Member

J. BENNETT JOHNSTON, LOUISIANA, CHAIRMAN
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United States Senate
COMMITTEE ON
ENERGY AND NATURAL RESOURCES
WASHINGTON, DC 20510-6150

September 16, 1988

The Honorable John S. Herrington
Secretary
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Dear John:

On February 23, 1988, in contemplation of an oversight hearing, I wrote you to request that you undertake an independent policy and legal review of DOE's advocacy of the so-called "central figure theory" well in advance of the hearing. The central figure theory would permit restitution of moneys never received by individuals in oil overcharge cases without the need to prove wrongdoing or benefit, the right to a jury trial, the ability to assert meaningful defenses, or a statute of limitations on DOE's filing of a case.

On July 7 1988, I sent you the last five pages of transcript from the hearing, imploring you to review them and take action to resolve this unfair situation.

At Joseph Salgado's July 11, 1988, confirmation hearing for the post of Deputy Secretary, he stated that he had come to have serious doubts about DOE's policy advocating the theory. As a result, Mr. Salgado formed a Central Figure Review Group to conduct an independent policy and legal analysis of this issue, promising to report the findings promptly to you and to this Committee. Mr. Salgado pledged to submit his analysis of the Group's findings some time soon after September 6, 1988.

Yet, as of today's date, no findings have been conveyed to this Committee. Nor have DOE staff responses to my August 12, 1988, second set of follow-up questions concerning the central figure theory been submitted for this Committee's evaluation.

John, I continue to believe this is one of the most outrageous examples of an unbridled government in action that I have ever witnessed. I would like to once again importune you to expedite the awaited staff responses, and to personally seek to rectify this situation.

With kindest personal regards,

J. Bennett Johnston
Chairman

JBJ/ask

THE SECRETARY OF ENERGY
WASHINGTON, D.C.

October 19, 1988

Dear Bennett:

Thank you for your letter of September 16, 1988, in which you brought to my attention your concerns about the evident lack of progress in presenting the findings of the Central Figure Review Group and the staff responses to the second set of follow-up questions stemming from the hearings that your Committee conducted on central figure cases.

A draft of the findings of the Central Figure Review Group has been prepared for consideration by the members of the group. Although this draft has yet to be adopted by the group, it has been presented to Deputy Secretary Salgado for his concurrent review in order to accelerate the pace of the Department's consideration of this matter.

I am informed that responses to the second set of follow-up questions have been prepared and their review by the Department of Justice has now been completed. I anticipate that you will receive them this week.

I very much appreciate the personal attention you have devoted to this matter in order that we can be confident that the Department acts properly when making judgments necessary to carry out its remaining petroleum pricing enforcement responsibilities.

Yours truly,

John S. Herrington

Honorable J. Bennett Johnston
Chairman
Committee on Energy and
Natural Resources
United States Senate
Washington, D.C. 20510

cc: Honorable James A. McClure
Ranking Minority Member

Department of Energy
Washington, DC 20585

October 28, 1988

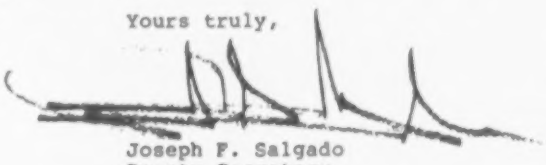
Dear Mr. Chairman:

This is in response to your letter of August 12, 1988 regarding the "central figure" issue. I regret the misunderstanding which has arisen in the course of previous correspondence between the Department and your Committee on this subject. I assure you that the Department has at all times striven to be completely accurate and responsive in the preparation of answers to the Committee's questions.

I enclose a memorandum which has been prepared by the staff familiar with the previous correspondence, which responds to the concerns expressed in your letter of August 12. The memorandum provides supplemental comments to the staff responses that were provided with the letter of July 25, 1988, to address the concerns stated in your letter of August 12. (The memorandum does not contain supplemental comments to the responses to questions 4, 13, 14, 15, 18 and 19, because the original responses did not seem to have any of the problems you mentioned in your letter.) The memorandum also responds to the seven additional questions raised in your August 12 letter.

Thank you for the opportunity to supplement the staff responses regarding these matters, and to clear up any misunderstandings which may have arisen.

Yours truly,



Joseph F. Salgado
Deputy Secretary

Enclosure

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, D.C. 20510

cc: Honorable James A. McClure
Ranking Minority Member

RESPONSE TO CHAIRMAN J. BENNETT JOHNSTON'S LETTER
DATED AUGUST 12, 1988

Chairman Johnston's letter raised concerns that the DOE responses of June 12 and July 25, 1988, contained inconsistencies or were not fully responsive. In addition, the August 12 letter asked seven new questions.

Part I of the following material responds to the concerns in the August 12 letter regarding previous staff responses. The format is based on the July 25 letter. The question and the original response are set out, followed by a supplemental response. The responses to Questions 4, 13, 14, 15, 18, or 19, do not appear to require elaboration and are not included here. Part II of the following material responds to the questions which appear on page 2 of Chairman Johnston's letter of August 12.

I. SUPPLEMENTAL COMMENTS TO STAFF RESPONSES TO QUESTIONS FOR JOSEPH SALGADO IN THE LETTER FROM CHAIRMAN JOHNSTON DATED JULY 13, 1988

QUESTION NO. 3

Does DOE consider FERC decisions reviewing remedial orders issued by OHA as binding on subsequent DOE remedial orders? If not, why not?

ANSWER

The OHA is the agency within DOE to which the Secretary has delegated the function of issuing remedial orders under section 503 of the Department of Energy Organization Act. In several decisions, OHA has indicated that, in a proper case, it may not treat FERC decisions in prior cases as binding if, for example, there appears to be a TECA decision which requires a result different from that embodied in the FERC decision. See, e.g., Texaco, Inc., 16 DOE ¶ 83,016 at 86,165 (1987). See also J.R. Cone, 14 DOE ¶ 83,011 at 86,060 (1986); Atlantic Richfield, 11 DOE ¶ 83,027 at 86,272 n.61 (1984).

SUPPLEMENTAL COMMENT

OHA gives great weight to FERC decisions and, of course, is bound by the "law of the case" which may be established by a FERC ruling for a particular proceeding. However, OHA does not consider FERC precedents binding and will depart from them when there is sufficient reason to believe that a different result is required. This is in accord with the rule that nonmutual collateral estoppel does not lie against the government. See United States v. Mendoza, 464 U.S. 154 (1984).

QUESTIONS RELATED TO RESPONSES THAT DOE SUBMITTED ON JUNE 15, 1988

QUESTION NO. 5

Did DOE have uninhibited access to the corporate books and records of the companies in the Citronelle-Mobile case for more than 3 weeks in July 1975? If not, state with particularity any books, records or documents to which DOE was denied access.

ANSWER

We are unable to state definitely what was the extent of access DOE had to the corporate books and records of the companies in July of 1975. Trevor Hawk, the auditor who conducted that on-site audit, is deceased, so we are conducting a search for relevant documents. Those files have been retired and are not immediately available. At the initial trial on the subpoena enforcement aspect of the case, Mr. Hawk testified that he was given access to the books and records that he needed for purposes of his audit. He indicated that what he had been looking for was financial records concerning the sales in question, which under audit methodology at that time probably would not have included any attempt to trace the proceeds after initial receipt by the seller. So without knowing exactly what access he requested, we cannot indicate whether or not Mr. Hawk was given uninhibited access. He did state that there were some types of records that he would not have been interested in. The department ultimately determined that it had not received sufficient information during the course of that audit, and issued the subpoenas which became the subject of the Chamberlain Group's initial complaint in the Citronelle-Mobile case.

SUPPLEMENTAL COMMENT

A. The review of the audit files related to the period July 1-24, 1975, referred to in our original response, has now been conducted. Contemporaneous notations by Mr. Hawk indicate that, during that time period, his audit activities were conducted with the full cooperation of corporate

officials. While we have not found in the audit file a specific written record of the scope of access Mr. Hawk requested, the audit report and the attached accompanying schedule indicate that the audit activities at that time consisted of an examination of the companies' accounting treatment of costs and revenues associated with the challenged transactions.

B. Chairman Johnston's letter states that there are inconsistencies between the staff's July 25 response to Question 5 (quoted above) and the staff's June 12 response to Senator McClure's Question 16, in that the June 12 response was a categorical negative, while the July 25 response stated that the question (No. 5) could not be answered without a review of the audit files. The reason for the discrepancy is that the staff understood Senator McClure's Question 16 to be addressed to information which had been presented to the courts as part of the litigation record "in the case, including [Chamberlain's] petition to the Supreme Court for certiorari," while Chairman Johnston's Question 5 was addressed specifically to the DOE on-site audit in July of 1975, which was not part of the court record.

QUESTION NO. 6

Did the information obtained by DOE in the course of its July 1975 audit include documentation showing what happened to that portion of the proceeds of the challenged transactions that was received by the companies, through the date of the audit, including the payment of $3.4 million in state and federal corporate income taxes by the companies? If not, state with particularity what documentation was requested but not received.

ANSWER

It is not possible to answer that question without reviewing the audit files to see what information was actually obtained, so that we could say whether they show what had happened to the portion of the proceeds which the companies received. As noted in the response to Question 5, we are conducting a search of the files for relevant information. It should be noted that, as Mr. Hawk testified at the trial, the focus of the July 1975 audit was on the questions of whether there had been a violation and what the violation amount consisted of, rather than the disposition of the proceeds.

SUPPLEMENTAL COMMENT

The initial response to Question 6 stated that it was impossible to answer the question substantively without reviewing the audit files. Our recent review of the audit papers relative to the period July 1-24, 1975, shows that information was obtained from company officials during the audit which demonstrated the accounting treatment the Citronelle companies gave to the proceeds of the transactions up to the point at which pre-tax profits were attributed to the companies. This information included the companies' accounting treatment of costs attributed to the transactions, including the acquisition cost of the crude

oil, and other associated payments to groups and individuals, including the payment of $147,028.59 to Mr. Chamberlain. We have not found in our records of the July 1975 site visit any notation which indicates one way or the other whether the auditor saw, asked for, or was offered any information regarding the companies' payment of any amount as state or federal income taxes on the proceeds of the transactions. Mr. Hawk would probably not have considered tax information relevant for purposes of evaluating whether the transactions violated DOE petroleum price controls, and if so by what amount, but it is possible that he saw some such information and simply did not make any notation of it. There is no indication that the auditor was refused access to any information that he requested in July 1975.

QUESTION NO. 7

In August and September, 1985, did the government engage in comprehensive discovery of all potentially relevant financial information pertaining to the companies and to Mr. Chamberlain personally, for the period beginning November 1973 (prior to the transactions), through August 1985?

ANSWER

In response to an order compelling compliance with discovery entered by Chief Judge Alaimo, the Chamberlain Group, in August of 1985, provided substantial financial information regarding Chamberlain and his companies. As we indicated in the response to Question 19 in the June 15 letter, these materials are the subject of a protective order, which precludes dissemination of information submitted in response to the discovery. We attach a copy of the protective order.

SUPPLEMENTAL COMMENTS

The Government served interrogatories on the Chamberlain Group in 1983, which asked for the following information:

> The total assets and the total liabilities of each counterclaim-defendant as of specific dates; changes in assets occurring since the date of the first district court decision; corporate transfers of real or personal property or loans to Mr. Chamberlain or his relatives since November 30, 1973; the sale, transfer, or other disposition of any securities or interest in real property; salaries, dividends, expenses, and other payments to Mr. Chamberlain or his relatives from 1973 to the present; shareholder and share information for each company controlled by Mr. Chamberlain; and the location of applicable documents such as state and federal income tax returns, books, and other records.

The Chamberlain group provided responses to these interrogatories in August of 1985. While comprehensive, this discovery did not seek or obtain all potentially

relevant financial information. For instance:

1) As stated in the government's motion to compel discovery, the discovery was specifically designed: a) to discover assets that might satisfy a judgment; b) to discover whether Mr. Chamberlain improperly drained assets from the corporations in a way that would support a traditional "piercing" theory; c) to discover the amount of taxes, losses, and other amounts Mr. Chamberlain was claiming as set-offs. "Tracing," or attributing particular receipts of cash to particular disbursements post facto, requires making certain legal and accounting assumptions, and the discovery did not seek information sufficient to permit a determination of what happened to the particular dollars received in the subject transactions as opposed to dollars received in other transactions.

2) In the responses, certain categories of Mr. Chamberlain's assets were listed without values.

3) For some accounts, end-of-year balances were provided, but no detail regarding activity during the periods.

4) Documentation of some disbursements was not sufficient to permit analysis to determine the relationship between certain money transfers among Mr. Chamberlain and affiliated companies.

QUESTION NO. 8

Did the information furnished in response to discovery constitute documentation showing what happened to that portion of the proceeds of the challenged transactions that was received by the companies, through the date of the response? If not, please state with particularity what documentation was requested but not received.

ANSWER

In order to respond to this question, the Department would be required to reveal the essence of the information contained in the Chamberlain Group's discovery responses. In view of the limitations on disclosure imposed by the protective order, the Department is not in a position to respond to this question substantively.

SUPPLEMENTAL COMMENTS

Beyond the area of costs directly associated on the companies' books with the revenues the corporations received in the transactions, it is difficult to attribute specific disbursements, or parts of disbursements, to specific sources of funds. If the companies in question had only had the four transactions in issue in the litigation, all disbursements could be attributed to those receipts. But the companies remained in operation, apparently, during the entire period of DOE price controls, or at least through 1980. To do a full tracing analysis of the proceeds of the transactions under those circumstances would require a number of assumptions and detailed information regarding all receipts and disbursements during the relevant period. While the discovery responses reflected interaffiliate transfers of funds, some were shown with values and some

without, some with documentation and some without, and they were not linked to overall receipts and disbursements during the period.

As stated earlier, the discovery requests were not formulated to elicit tracing information, and the responses did not contain that level of detail. Thus, while the responses contained a substantial amount of financial information, the companies and Mr. Chamberlain did not, nor were they required to, keep their books and records or prepare their discovery responses to account for disbursements in accordance with sources of funds.

QUESTION NO. 9

Did Mr. Chamberlain's lawyers produce for the government a flow chart which was based upon documentation furnished to the government, and which summarized what happened to that portion of the proceeds that was received by the companies? Was this flow chart received into evidence as Exhibit 14 in the trial of Citronelle-Mobile case without challenge by the government as to its accuracy? If not, please state with particularity the basis for denial.

ANSWER

At the trial in 1985, the Chamberlain Group's lawyers introduced a flow chart into evidence as Exhibit 14. The flow chart was prepared in two versions, apparently, one of which was received into evidence at the trial in 1985 over the government's objection that it was irrelevant. The government did not challenge its accuracy.

The chart shows how the proceeds were immediately shared as between the two companies, and the taxes paid by each company on its share. The more elaborate version then shows the effect of operating losses on the companies through, respectively, December 31, 1979, and February 28, 1980, but does not show distributions over those periods, or any information after those dates.

SUPPLEMENTAL COMMENTS

The flow chart which was admitted reflected sales, related costs and expenses, and taxes paid, thus showing each company's net after-tax income from the transactions.

However, the chart did not show what happened to the proceeds of the challenged transactions received by the companies. Exhibit 14 reflects that there was net after-tax income from the transactions but does not show what happened to that net income.

QUESTION NO. 10

Doesn't trial Exhibit 14 constitute "documentation ... showing what happened to proceeds of these transactions that were received by the companies after they were received by the companies"? If not, please state with particularity the basis for such denial.

ANSWER

For the reasons stated in the answer to Question 9, neither version of the chart purports to show what disposition has been made of the after-tax funds the corporations received.

SUPPLEMENTAL COMMENTS

See responses and supplemental comments to Questions 8 and 9.

QUESTION NO. 11

In view of the responses to the questions 5 through 10, please explain DOE's June 15, 1988, response to question No. 16 tnat "Yes, it is true" that Mr. Chamberlain has never presented any documentation at any stage in the case ... showing what happened to that portion of the proceeds of these transactions that were received by the companies ..."

ANSWER

The answer to Question 16 was prepared based on the understanding that the question was addressed specifically to documents which had been submitted to the courts either in evidence or in argument, "at any stage of the case, including [the] petition for certiorari." As noted above, Exhibit 14, which was admitted in evidence at the trial in 1985, does not "show what happened to proceeds of these transactions that were received by the companies."

SUPPLEMENTAL COMMENTS

See responses and supplemental comments to Questions 5, 6, 9 and 10.

QUESTION NO. 12

Did Mr. Chamberlain furnish responses to interrogatories and documents in response to production requests that fully disclosed how much he "received by way of corporate distributions in whatever form" for the period November 30, 1973 through August 13, 1985? If not, please state with particularity what information on this subject was requested but not produced.

ANSWER

In view of the protective order's limitation on disclosure of the discovery responses, the Department states that Mr. Chamberlain submitted substantial responses to the government's discovery requests for a statement of payments, loans, or transfers of funds between the companies and Mr. Chamberlain.

SUPPLEMENTAL COMMENTS

Mr. Chamberlain provided responses to the government's discovery requests, including the request to list all payments that he received from the companies. As noted above, in response to Questions 7, 8 and 9, the information that the government requested and the information provided did not permit tracing all proceeds of the transactions.

QUESTION NO. 16

In light of the responses to Questions 12 through 15, how do you explain DOE's June 15, 1988, response that "the record is not dispositive on this point [corporate distributions that may have been received by Mr. Chamberlain]"?

ANSWER

As we explained in the original response to Question 19, there was no judicial finding on the amount of corporate distributions that may have been received by Mr. Chamberlain. Judge Alaimo found in his order of December 30, 1985, that "Defendant Chamberlain earned $147,828.59--in excess of the ceiling prices applicable to nonexempt domestic oil sales--from his share of the Citronelle crude Gathering and Services acquired for resale to PETCO." (Slip op. at 6). The Court made no finding with respect to the amount of corporate distributions Mr. Chamberlain may have received. Indeed, there may be no evidence in the record on that issue. Accordingly, in our view, the record is not "dispositive" of the question of Mr. Chamberlain's receipt of corporate distributions.

SUPPLEMENTAL COMMENTS

If the September 1980 holding of Judge Pittman that Mr. Chamberlain's liability was limited to the amount by which he directly benefitted from the transactions, had been affirmed on appeal, arguably the record would have been dispositive, or conclusive on the question of corporate distributions that may have been received by Mr. Chamberlain, even though the government did not attempt to develop fully the evidence in the record on that point. However, the holding was reversed on appeal and is of no force or effect. As noted above the material which has been submitted to the government, both before and during the

litigation of this case, is not sufficiently detailed in all respects to be "dispositive."

QUESTION NO. 17

In light of the responses to Questions 12 and 15, please explain DOE's June 15, 1988 response No. 23 that "there has been legal argument over how much he [Mr. Chamberlain] personally received as opposed to the corporations he owned and controlled." Is this statement intended to mean anything more than that the government contends, as a matter of law, that Mr. Chamberlain should be deemed to have received revenues that were received by the corporations? If so, please identify with particularity the documents or statements wherein the government contended that Mr. Chamberlain personally received revenues from the sale of crude oil in question that were greater than the amounts identified in Questions 12 and 13 above.

ANSWER

The auditor on the case for the Department of Energy, Trevor Hawk, ascertained that on December 31, 1974, Citronelle-Mobile Gathering made payments to interest owners, including Bart B. Chamberlain, in crude oil produced from the Citronelle Field's Citronelle Unit. Mr. Chamberlain's share was $147,828.59. Mr. Hawk so deposed in an affidavit dated January 11, 1980, made in support of counterclaimant's motion for summary judgment.

On September 9, 1985, counterclaim-defendants submitted proposed findings of fact which stated, "The total amount earned by Chamberlain, in excess of of [sic] the ceiling prices applicable to non-exempt sales, for his share of Citronelle Unit production acquired by Gathering and Services for resale to PETCO was $147,828.59. . . ."

Subsequently at the trial held October 1 and 2, 1985, the government attempted to introduce the Hawk affidavit in lieu of Mr. Hawk's testimony because Mr. Hawk had died the previous spring. In opening the trial, Judge Alaimo had said, "One thing that I might tell you in advance, I don't think the issue of Chamberlain's personal liability is open. . . . It's my view that [Judge Pittman's] holding that the liability of Chamberlain is limited to the extent of his receipt of the proceeds from the sales of PETCO is the law of the case. I don't care to hear about it." He subsequently ruled against admitting the Hawk affidavit as lacking the necessary trustworthiness, and would not permit the government attorney to argue the issue of Chamberlain's liability.

The government challenged the district court's limit on Chamberlain's liability to the proceeds he received in its appeal to TECA. The government cited Sheldon v. Metro-Goldwyn Pictures, 106 F.2d 45, 52 (2d Cir. 1939) (L. Hand, J.), aff'd on other issues, 309 U.S. 390 (1940), for the point that defendant shareholders were held responsible for making restitution of the corporation's profits whether or not the shareholders actually received the proceeds or instead merely had the value of their shares enhanced by the amount of the unlawful profits. In this case, Mr. Chamberlain's ownership interest in Citronelle-Mobile Gathering, Inc. was 95%.

SUPPLEMENTAL COMMENTS

At the trial in 1985 and in the appeals thereafter, the government did not assert that Mr. Chamberlain's liability should be measured by what he directly received or that he had directly received any amount except the $147,828.59, which was stipulated after the trial. Rather, the government contended that as the central figure in the price violation, Mr. Chamberlain was liable with his corporations for the full amount of the overcharges regardless of proceeds he personally received. The government did assert that to the degree Mr. Chamberlain's benefits were relevant, as a legal matter, they should be considered to include the benefit he derived as the dominant shareholder from the increase in the Citronelle companies' assets as a result of the transactions.

II. STAFF RESPONSES TO NUMBERED QUESTIONS 1 THROUGH 7 AT PAGE TWO OF THE LETTER FROM CHAIRMAN JOHNSTON DATED AUGUST 12, 1988.

1. Does DOE know how much money the Citronelle corporations received as a result of the regulatory violations?

Based on the undisputed documentation in the Citronelle companies' records, the government stipulated, and the District Court found, that the amount the Citronelle companies received as a result of the regulatory violations was $3,433,213 each, before taxes.

2. Does DOE know the amount of corporate taxes paid by those corporations on account of the receipt of such moneys?

Based on the undisputed documentation in the Citronelle companies' records, the government stipulated, and the District Court found, that the amount of corporate taxes those corporations paid on account of the receipt of such moneys was $1,602,728 for Gathering and $1,766,753 for Services.

3. Does DOE know what corporate payments were made to Mr. Chamberlain, from a time prior to the challenged transactions (November 1973) through August 1985, in the form of salaries, bonuses, dividends, fees, or any other transfer of assets?

The government stipulated that Mr. Chamberlain received $147,828.59 from the sale of Citronelle Field crude oil based on information available to DOE, and that figure represents Mr. Chamberlain's share of the amount in excess of the ceiling price which the companies paid their suppliers in the transactions. In response to the government's discovery request

in 1985, Mr. Chamberlain provided information regarding all money transfers, including salaries, bonuses, dividends, fees and other transfers of assets, between Mr. Chamberlain and the companies. DOE has no reason to question the accuracy of that information. Subject to possible questions about the interpretation of that information, those responses indicate the amount Mr. Chamberlain has received from the companies. The responses do not indicate, and the discovery sought by the government did not seek to determine, whether or to what extent any particular distributions to Mr. Chamberlain "match up" with particular dollars received in the four transactions at issue in the litigation.

4. Did DOE introduce evidence at the trial of the case as to the amount of money Mr. Chamberlain received as a result of the challenged transactions?

The government introduced Mr. Chamberlain's proposed finding of fact No. 36, which shows an amount Mr. Chamberlain received as a result of the challenged transactions.

5. What was that amount?

$147,828.59

6. Did DOE attempt to show receipt by Mr. Chamberlain of any additional moneys? If so, provide copies of documents or statements made in such attempt.

The government did not attempt to show receipt by Mr. Chamberlain of any additional moneys.

7. Is DOE's unqualified response to Senator McClure's Question 16 correct?

Senator McClure's Question 16 reads as follows:

> Isn't it true that Mr. Chamberlain has never presented any documentation at any stage in the case, including his petition to the Supreme Court for certiorari, showing what happened to that portion of the proceeds of these transactions that were received by the companies after they were received by the companies?

DOE's staff response was:

> Yes, it is true.

While it is correct that Mr. Chamberlain did not present court documentation showing what happened to that portion of the proceeds, he did present to the government, in discovery responses, documentation on the issue of money transfers between Citronelle-Mobile and Citmoco Services, and between other affiliated companies and Mr. Chamberlain personally. As is discussed in the responses and supplemental comments to questions 5, 6, 9, 10, 12 and 16, that documentation did not fully show what had happened to the proceeds of these transactions that were received by the companies after they were received by the companies. As is noted in the response to Question 11 in the July 25 responses, the question was understood to address the documentation that was in the court record, because of the reference to the certiorari petition, and the explicit reference to the record in Senator McClure's Question 19.

The Deputy Secretary of Energy
Washington, DC 20585

November 7, 1988

Dear Mr. Chairman:

The Department's Central Figure Theory Review Group has recently completed its deliberations and review of the application of Central Figure Theory to petroleum overcharge violation cases. I am providing to you a copy of the review group's report to me, including its recommendations, which I have accepted. The Economic Regulatory Administration has been directed to initiate action on these recommendations immediately.

The Department undertook this review in order to assure that prosecution of these cases is pursued in a manner which is consistent with law and equity and which will prove fair to both the government and those charged with violations. We believe that a fair recovery of damages can be made in these cases in a manner which is commensurate with both the benefit derived by the individual as a result of the violation and the individual's ability to pay.

I appreciate your interest in this matter and trust that upon review of our report you will find our approach to be a reasonable and equitable means of addressing these cases. Thank you for your views and your interest in this effort.

Yours truly,

Joseph F. Salgado
Deputy Secretary

Enclosure

Honorable J. Bennett Johnston
Chairman, Committee on Energy
and Natural Resources
United States Senate
Washington, DC 20510

cc: Honorable James A. McClure
Ranking Minority Member

The Deputy Secretary of Energy
Washington, DC 20585

November 4, 1988

MEMORANDUM FOR: Chandler L. van Orman
Acting Administrator
Economic Regulatory Administration

Subject: Recommendations of the Central Figure Theory Review Group

I have considered the subject recommendations (copy attached) and accept them without change. You are directed to initiate action to implement these recommendations immediately. Please provide me with a report on the progress achieved by the end of the calendar year.

Thank you.

Joseph F. Salgado

Attachment

Celebrating the U.S. Constitution Bicentennial — 1787-1987

Department of Energy
Washington, DC 20585

November 2, 1988

MEMORANDUM FOR THE DEPUTY SECRETARY

From: Chairman, Central Figure Theory Review Group

Subject: Final Report of the Review Group

The attached report represents the final conclusions and consensus recommendations of the Central Figure Theory Review Group. We believe that these recommendations will provide a reasonable and equitable approach to addressing these cases.

I am advised by the Administrator that the Economic Regulatory Administration stands ready to initiate action on these recommendations immediately upon your approval.

Donna R. Fitzpatrick
Under Secretary

Attachment

REPORT OF THE CENTRAL FIGURE THEORY REVIEW GROUP

The Central Figure Review Group has concluded its review of ERA's prosecutorial efforts in attempting to hold individuals jointly and severally liable with respondent corporations on the basis that the individuals were "central figures" in the commission of regulatory overcharge violations.

While review of the federal jurisprudence indicates that such a theory of individual liability is reasonably available to the government in formal litigation, our inquiry was principally directed to the circumstances and equitable factors which we believe should be considered by the Department in applying its prosecutorial discretion in the pending cases involving tortious conduct or central figure allegations.

The Review Group conducted a detailed review of the relevant facts and circumstances in each of the 31 cases pending at OHA and FERC, in which 43 individuals are subject to allegations of tortious conduct. Upon consideration of the factors present in each of those cases, we have concluded that:

1. All tortious conduct charges currently pending against all non-shareholder (i.e., employees) individuals should be dismissed, except for those charges pending against any individual(s) convicted of a criminal offense which was related to or arising from the course of conduct comprising the alleged regulatory violation.

2. ERA should move in each case to amend the amount sought from each shareholder individual charged with Central Figure liability; the portion of overcharge and interest sought from each individual would be equal to the individual's portion of equity in the corporation during the period of the alleged violation.

3. Based on a review of the facts and equities present in the Valentine and Mt. Airy cases, the group recommends that ERA move to dismiss the central figure charges pending against all of the individual respondents in those two cases.

4. All charges pending against individuals based on "traditional" theories of individual liability (e.g., trust fund doctrine, partnership, piercing, etc.) would be unaffected.

5. In the context of attempting to settle cases and complete the enforcement litigation, ERA should accept the lesser of (1) the amounts claimed under paragraph 2 above, further taking into account any lesser amount by which the individuals benefited (plus applicable interest), provided that the individuals and corporations can trace and account for the disposition of assets from the violation period, and establish that they have not secreted assets, or (2) a percentage of the individual's net worth, based upon the individual's ability to pay. (Such an approach is currently being used to settle a number of cases pending before FERC.)